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IN THE

United States Supreme Court

GREG RUGGIERO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT T. PERRY
Counsel of Record
BARBARA J. OLSHANSKY
Center for Constitutional Rights
666 Broadway, Seventh Floor
New York, New York 10012
212-614-6480

Counsel for Petitioner

QUESTIONS PRESENTED

Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, § 632(a)(1)(B), 114 Stat. 2762, automatically and permanently disqualifies all former unlicensed "microbroadcasters" from applying for low power FM radio ("LPFM") licenses or becoming parties to LPFM license applications.

1. Whether Section 632(a)(1)(B) is subject to intermediate scrutiny under the First Amendment and Equal Protection guarantee of the Fifth Amendment, given that the statute (a) bars future constitutionally protected speech (including core political expression) over the broadcast medium, (b) singles out a small segment of the press for an especially harsh sanction, and (c) diminishes diversity of information over the broadcast medium by disqualifying individuals and groups who might become vital sources of local radio programming.

2. Whether Section 632(a)(1)(B) can survive intermediate scrutiny, given that (a) there exists a readily available, equally effective, less-burdensome alternative, (b) the statute leaves civil wrongdoers, felons, and regulatory violators other than unlicensed microbroadcasters eligible for low power and full power broadcast licenses, even though their misconduct raises the same character concerns as does unlicensed microbroadcasting, and (c) the statute covers many circumstances only marginally related to the government interest in ensuring compliance with broadcast laws and regulations.

LIST OF PARTIES

The parties before this Court are petitioner Greg Ruggiero and respondents Federal Communications Commission and United States of America. Petitioner in this Court was the petitioner in action no. 00-1100 in the court below. Respondents here were the respondents in action no. 00-1100 in the court below.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

No. __-____

GREG RUGGIERO,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Greg Ruggiero respectfully petitions this Court to issue a writ of certiorari to review the January 31, 2003 judgment of the United States Court of Appeals for the District of Columbia Circuit sitting en banc, sustaining Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, § 632(a)(1)(B), 114 Stat. 2762, and the Federal Communications Commission's implementing regulations.

OPINIONS BELOW

The en banc decision of the United States Court of Appeals for the District of Columbia Circuit (App. 3a) is reported at 317 F.3d 239. The en banc order vacating the panel decision (App. 50a) is unreported. The panel decision (App. 52a) is reported at 278 F.3d 1323.

JURISDICTION

The court of appeals issued its en banc decision on January 31, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Radio Broadcasting Preservation Act of 2000 ("RBPA"), Pub. L. No. 106-553, 114 Stat. 2762, is reproduced in the Appendix at 76a. Relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, are reproduced in the Appendix at 79a.

The Federal Communications Commission ("FCC") implemented the RBPA in *Creation of Low Power Radio Serv.* (*Second Report and Order*), 16 F.C.C. Rcd. 8026

(2001), relevant excerpts of which are reproduced in the Appendix at 83a. Relevant excerpts from the FCC's earlier statements in the same rulemaking proceeding (MM Dkt. No. 99-25) are reproduced in the Appendix at 89a, 99a, and 112a.

STATEMENT OF THE CASE

Congress has retroactively targeted a narrowly circumscribed class of speakers—former unlicensed low power FM radio broadcasters—for an especially harsh sanction: automatic and permanent disqualification from holding low power FM radio broadcast licenses—the only broadcast licenses practically available to them. This draconian sanction is unprecedented. Until now, no one has ever been subject to an automatic lifetime bar from broadcasting because of prior misconduct, no matter how serious. Rather, every broadcast license applicant—including every civil wrongdoer, felon, and inveterate regulatory violator—has been given an opportunity to show that he or she can operate a broadcast station in the public interest despite past misconduct—misconduct often far more serious than the misconduct at issue here.

During the 1990's, hundreds of unlicensed "microradio" stations began broadcasting in communities all across the United States in an attempt to offset the sharp decline in local programming on licensed commercial and noncommercial radio stations—a decline brought about by, among other things, the massive consolidation of radio station ownership. Communities came to rely on unlicensed "microbroadcasters"—the alternative broadcast press—to bring them news, commentary, and debate on local issues

of public importance—issues that were not addressed elsewhere on the radio dial.

Many unlicensed microbroadcasters took to the airwaves as an act of civil disobedience to prod the Federal Communications Commission ("FCC") to repeal its longstanding ban on low power FM broadcasting—a ban that also contributed to the decline of local radio programming in the United States. Most caused no signal interference. Nonetheless, Congress has automatically and permanently barred all former unlicensed microbroadcasters from holding low power FM radio licenses, even those who only briefly or long ago engaged in unlicensed broadcast operations and those who have become model citizens since ceasing unlicensed broadcast operations.

The sanction imposed on former unlicensed microbroadcasters is analogous to a municipality's decision—in response to peaceful civil disobedience protesting unduly restrictive permit policies for parades in public parks—to automatically and permanently bar the participants in that civil disobedience from receiving any future permits to hold parades in those parks. This Court has made clear that a permanent ban on access to a public forum based on past misconduct cannot survive First Amendment scrutiny. *Kunz v. New York*, 340 U.S. 290, 294-95 (1951).

By targeting former unlicensed microbroadcasters for the sanction of automatic and permanent disqualification from holding low power FM radio licenses, Congress has strayed far afield from this country's commitment to First Amendment freedoms. Petitioner respectfully requests that this Court grant certiorari to address this unprecedented sanction.

Regulatory Background and Procedural History

1. Any person seeking to operate a broadcast station must apply to the FCC for a broadcast license. 47 U.S.C. § 301. Each broadcast license applicant must meet the "character" qualifications prescribed by the FCC. 47 U.S.C. § 308(b). The FCC has long regarded "truthfulness" and "reliability" as the character traits most relevant to broadcast licensing. *Policy Regarding Character Qualifications in Broad. Licensing*, 102 F.C.C. 2d 1179, 1209 (1986), *recon. granted in part and denied in part*, 1 F.C.C. Rcd. 421 (1986) ("*Character Policy Statement*"). In assessing a broadcast license applicant's character, the FCC thus has focused on "the likelihood that [the] applicant will deal truthfully with the [FCC] and comply with the Communications Act and [broadcast] rules and regulations." *Id.* at 1183.

Recognizing that "there is no simple formula for predicting future conduct in every case," *id.* at 1225, the FCC, consistently throughout its regulatory history, has considered broadcast license applicants' prior misconduct on a case-by-case basis, affording even applicants who have engaged in "the most atrocious [FCC] infractions," *Weiner Broad. Co.*, 7 F.C.C. Rcd. 832, 834 (Rev. Bd. 1992), an opportunity to show that they can reliably operate broadcast stations in the public interest despite past misconduct. *Character Policy Statement*, 102 F.C.C. 2d at 1225-29.

Moreover, because of "[t]he inherent inequity and practical difficulty involved in requiring applicants to respond to allegations" of events in the distant past, the FCC long has disregarded misconduct over 10 years old, even when it involved "flagrant disregard of the [FCC's] regulations

and policies." *Id.* at 1229. Further, mindful that even the most inveterate regulatory violators can mend their ways, the FCC has always deemed rehabilitation to be a "significant" factor in assessing a broadcast license applicant's character qualifications.[1] *Id.* at 1228.

The FCC thus gave Allen Weiner "ample opportunity to present mitigating evidence" in support of his broadcast license application, even though Weiner had operated multiple unlicensed radio stations, flouted a court injunction, and misrepresented his true intentions in prior broadcast license applications. *Weiner Broad. Co.*, 6 F.C.C. Rcd. 4337, 4338-43, 4345 n.9 (1991), *aff'd*, 7 F.C.C. Rcd. 832 (Rev. Bd. 1992). And, while it eventually denied Weiner's application, the FCC stipulated that: "[s]hould a 'decent interval' ensue without notable delict, Weiner is not estopped from applying again." *Weiner Broad. Co.*, 7 F.C.C. Rcd. at 834.

Similarly, the FCC permitted L.D.S. Enterprises, Inc. to argue that its principal stockholder had been rehabilitated, even though five years earlier, the FCC had revoked that stockholder's broadcast licenses "for perhaps the most amoral skein of detected villainy in domestic broadcast history," *Weiner Broad. Co.*, 7 F.C.C. Rcd. at 834, involving: (i) deliberate newscast distortions to favor certain

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[1] The FCC has relied on these character qualification policies not only to ensure the selection of truthful and reliable broadcast licensees but also to deter future violations of broadcast laws and regulations. *Character Policy Statement*, 102 F.C.C. 2d at 1228. In that regard, the FCC has observed that the loss of *one* broadcast license (as opposed to total disqualification from holding broadcast licenses) "will likely serve to deter all but the most unrepentant from serious future misconduct." *Id.*

Senatorial candidates; (ii) illegal campaign contributions and bribery of public officials; and (iii) attempted eavesdropping on and intimidation of FCC witnesses.[2] *L.D.S. Enterprises, Inc.*, 86 F.C.C. 2d 283, 284 (1981).

2. The FCC authorized regular FM radio broadcasting in 1941, setting aside channels for noncommercial educational ("NCE") stations. Robert J. Blakely, *To Serve the Public Interest: Educ. Broad. in the United States* 77 (1979). Seven years later, in 1948, seeking more rapid growth of NCE stations, the FCC authorized "Class D" (10-watt) stations. Carnegie Comm'n on Pub. Broad., *A Public Trust* 187 (1979). By the early 1970's, they comprised about one-half of all NCE stations. *Educational FM Radio—The Failure of Reform*, 34 Fed. Comm. L.J. 431, 436 (1982).

In the late 1970's, the FCC largely ceased licensing Class D stations. *Changes in the Rules Relating to Noncommercial Educ. FM Broad. Stations*, 69 F.C.C. 2d 240, 248 (1978), *modified*, 70 F.C.C. 2d 972 (1979). While recognizing that such stations "respond[ed] to discrete local needs," the FCC decided that higher powered stations promoted more "efficient channel usage." *Id.* Though grand-

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[2] Applying the FCC's traditional character qualification policies for broadcast licensees, an FCC Administrative Law Judge recently recommended renewal of notorious convicted computer hacker Kevin Mitnick's amateur radio license. *Kevin David Mitnick (Initial Decision)*, FCC 02D-02 (Released Dec. 23, 2002). *See also Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 194 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001) (noting that FCC considered broadcaster's proffer of "mitigating circumstances" to show that it could reliably operate broadcast stations in public interest even though its principal had 12 recent felony convictions for sexual assault on children and broadcaster deliberately concealed its principal's continued involvement in daily broadcast operations).

fathering a number of Class D stations, the FCC licensed only two new Class D stations—in remote communities—after 1978. *Grid Radio v. FCC*, 278 F.3d 1314, 1319-20 (D.C. Cir.), *cert. denied*, 123 S. Ct. 82 (2002).

A decade later, individuals and groups in communities across the United States began operating unlicensed low power FM—"microradio"—stations, broadcasting local news, educational, and cultural programs of interest to listeners in their limited coverage areas. Many of these unlicensed "microbroadcasters" operated in open defiance of the FCC's ban on low power FM radio stations, engaging in civil disobedience to compel a seemingly intransigent FCC to rescind the ban.[3]

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[3] Though violating the broadcast license requirement, almost all unlicensed microbroadcasters sought to avoid causing interference to licensed broadcast and non-broadcast stations. Prior to launching his unlicensed microradio station, for example, Rick Strawcutter retained an engineering firm to find a frequency over which he could broadcast without disrupting other stations' signals. *United States v. Any and All Radio Station Transmission Equip.*, 19 F. Supp. 2d 738, 740 n.4 (E.D. Mich. 1998), *rev'd*, 204 F.3d 658 (6th Cir. 2000). Upon learning that a Toledo translator station had complained of interference from his broadcasts—a complaint that the FCC found unsubstantiated (*id.* at 740 & n.3)—Strawcutter shut down until he could install a directional antenna to preclude any possibility of interference. *Id.* at 741.

True, the FCC has cited three instances in which unlicensed microradio stations interfered with air-to-ground communications. *Creation of Low Power Radio Serv. (Notice of Proposed Rulemaking)*, 14 F.C.C. Rcd. 2471, 2497, ¶65 (1999). Two, however, involved stations that evidently chose to broadcast on frequencies reserved for air traffic control. FCC, *News Release* Rep. No. CI 97-12 (Oct. 24, 1997). Almost all unlicensed microradio stations, by contrast, operated in the FM band to ensure reception of their broadcasts over ordinary FM radios.

The FCC held to its ban on low power FM radio stations through the 1990's. Prodded by the established broadcast industry, it cracked down on unlicensed microbroadcasters, ordering them to shut down and taking legal action against those who refused to do so. *See, e.g., Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63 (2d Cir. 1999); *Prayze FM v. FCC*, 214 F.3d 245 (2d Cir. 2000).

In January 1999, however, the FCC decided to reconsider its low power FM radio ban. Citing intense public interest in community radio, the FCC proposed the creation of a low power FM radio ("LPFM") service. *Creation of A Low Power Radio Serv.* (*Notice of Proposed Rulemaking*), 14 F.C.C. Rcd. 2471, 2476, ¶1 (1999). App. 92a. A year later, in January 2000, the FCC authorized LPFM service. *Creation of Low Power Radio Serv.* (*Report and Order*), 15 F.C.C. Rcd. 2205, 2006, ¶1 (2000) ("*Low Power Report and Order*"). App. 99a. To meet the critical need for "programming responsive to local community needs and interests," the FCC decreed that LPFM stations were to be operated on a noncommercial basis by nonprofit or governmental entities. *Id.* at 2213, ¶17. App. 100a.

In establishing the parameters for the new LPFM service, however, the FCC adopted an extremely broad rule limiting those who could apply for an LPFM license. Concluding that anyone who failed to comply with FCC orders to cease unlicensed broadcast operations lacked the ability "to deal truthfully with the [FCC] and to comply with [its] rules and policies," the FCC decided to accept LPFM license applications from unlicensed microbroadcasters *only* if they could certify (under penalty of perjury) that they shut down their stations within 24 hours of being ordered to do so or by February 26, 1999, whichever

occurred earlier. *Id.* at 2226, ¶54. App. 109a. The FCC extended that requirement to *every* party to an LPFM license application, including the applicant's officers and directors. *Id.* at 2224, 2226, ¶¶49, 54. App. 110a.

In automatically and permanently disqualifying unlicensed microbroadcasters who did not timely shut down their stations, the FCC purported "to apply the same character qualification requirements to [LPFM] licensees as we currently do to full power licenses," *Low Power Report and Order*, 15 F.C.C. 2d at 2226, ¶53 (App. 103a), though under its traditional character qualification policies for broadcast licensees, the FCC has *never* automatically and permanently disqualified a full power broadcast license applicant for past misconduct, no matter how serious. (*See* pp. 4-6 *supra*.)

Because petitioner was involved with an unlicensed microradio station that, as an act of civil disobedience, defied the FCC's orders to shut down, *Free Speech ex rel. Ruggiero v. FCC*, 1999 WL 147743 (S.D.N.Y.), *aff'd*, 200 F.3d 63 (2d Cir. 1999), he was automatically and permanently disqualified by the FCC's LPFM rules from joining in an LPFM license application.

3. Petitioner petitioned the Court of Appeals for the Second Circuit for review of the FCC's Low Power Report and Order, contending that the automatic and permanent disqualification of unlicensed microbroadcasters who did not timely shut down their stations violated his First Amendment rights. The petition was transferred to the Court of Appeals for the District of Columbia Circuit. Oral argument was held on November 28, 2000.

Three weeks later, Congress enacted the RBPA. App. 76a. Besides sharply limiting the number of LPFM licenses (by requiring minimum distance separations between new LPFM stations and full power FM radio stations on third adjacent channels), *id.*, § 632(a)(1)(A), the RBPA directed the FCC to "prohibit any applicant from obtaining [an LPFM] license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of [47 U.S.C. § 301]." *Id.*, § 632(a)(1)(B) ("Section 632(a)(1)(B)"). The RBPA further barred the FCC from granting waivers of this prohibition. *Id.*, § 632(a)(2)(B).

Aside from a few brief remarks by the RBPA's sponsors, Congress did not debate the need for Section 632(a)(1)(B). The sole legislative hearing focused almost exclusively on the established broadcast industry's claim that LPFM stations would cause harmful interference to full power FM radio stations. *FCC's Low-Power FM: A Review of the FCC's Spectrum Management Responsibilities*, Hearing on H.R. 3439 before Subcomm. on Telecomm., Trade, and Consumer Protection of House Comm. on Com., 106th Cong., 2d Sess. (2000). The only legislative finding on Section 632(a)(1)(B) simply states that "the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public," H.R. Rep. No. 106-567, 106th Cong., at 8 (2000), leaving unclear why that misconduct, alone among all forms of misconduct, warrants automatic and permanent disqualification from holding a broadcast license. There is no mention in the RBPA's legislative history of the FCC's traditional character qualification policies for broadcast licensees, even though the FCC has long and consistently

relied on those policies to weed out applicants who lack a commitment to follow broadcast rules and regulations and deter future broadcast-related violations. (*See* pp. 3-4 & n.1 *supra*.)

Following the RBPA's enactment, the court of appeals remanded the record to the FCC, directing the parties to file briefs addressing the constitutionality of Section 632(a)(1)(B) after the FCC issued implementing regulations. The FCC amended its LPFM rules to automatically and permanently disqualify all unlicensed microbroadcasters from holding LPFM licenses, even those who timely shut down their stations. *Creation of Low Power Radio Serv.* (*Second Report and Order*), 16 F.C.C. Rcd. 8026, 8030, ¶11 (2001). App. 85a.

On February 8, 2002, a divided panel struck Section 632(a)(1)(B) down on First and Fifth Amendment grounds. Writing for the majority, Judge Tatel held that the statute was subject to "appreciably more" than minimal scrutiny. App. 66a. Applying a heightened rational basis standard, Judge Tatel found Section 632(a)(1)(B) fatally under- and over-inclusive relative to the purpose of ensuring compliance with broadcast laws and regulations. On the one hand, the statute left "civil wrongdoers, felons, and even inveterate regulatory violators other than [unlicensed microbroadcasters]" free to apply for LPFM licenses. App. 67a. On the other hand, the statute covered many "circumstances only marginally related to the purpose of increasing regulatory compliance," disqualifying, among others, applicants who only briefly or long ago engaged in unlicensed broadcast operations. App. 69a.

On May 2, 2002, the court of appeals vacated the panel opinion and granted rehearing en banc. App. 50a. On Jan-

uary 31, 2003, the en banc court, by a 7-to-1 vote, sustained Section 632(a)(1)(B) against petitioner's First Amendment and Equal Protection challenges. App. 3a-49a.

4. Writing for the majority, Chief Judge Ginsburg rejected both the "narrow tailoring" standard urged by petitioner and the "rational basis" standard urged by the FCC. App. 3a-24a. Applying an undefined "middle ground" standard of review, the Chief Judge held that Section 632(a)(1)(B) was "reasonably tailored" to serve the government interest in ensuring compliance with broadcast laws and regulations. App. 13a.

While acknowledging that "malefactors" other than unlicensed microbroadcasters remained free, despite their past misconduct, to apply for LPFM licenses, Chief Judge Ginsburg found Section 632(a)(1)(B) not impermissibly underinclusive. App. 14a-16a. Even though Section 632(a)(1)(B) automatically and permanently disqualified individuals who only briefly or long ago engaged in unlicensed broadcast operations, the Chief Judge found the statute not impermissibly overinclusive. App. 16a. Summing up, the Chief Judge declared that there was a "reasonable fit" between Section 632(a)(1)(B) and the government interests in deterring unlicensed broadcasting and preventing future broadcast-related violations.[4] App. 18a.

Judges Randolph and Rogers concurred in separate opinions. Finding no possibility that Section 632(a)(1)(B) would chill third parties from exercising their First

[4] Chief Judge Ginsburg rejected petitioner's Equal Protection claim for the very same reasons that the Chief Judge rejected petitioner's First Amendment claim. App. 17a-18a.

Amendment rights, Judge Randolph concluded that petitioner lacked standing to make a facial overbreadth challenge. App. 23a. Finding the exemptions content-neutral, Judge Randolph concluded that the statute was not impermissibly underinclusive. App. 24a. Judge Rogers agreed that petitioner lacked standing to make a facial overbreadth challenge, though she also observed that a proper party asserting an overbreadth challenge could make "a strong case." App. 28a.

In his dissenting opinion, Judge Tatel criticized the majority for "gloss[ing] over [Section 632(a)(1)B)'s] unusual harshness": "No other violations of the Communications Act or broadcasting regulations result in automatic disqualification nor are punishable by this broadcasting equivalent of the death penalty." App. 30a. "Not only is [the statute] an unusually harsh broadcasting regulation," Judge Tatel wrote, "but automatic lifetime bans appear rarely in American law." App. 31a. Judge Tatel further noted that none involved restrictions on speech. App. 31a.

Judge Tatel expressed "two concerns" with the majority's analysis. First, he observed, the First Amendment values at stake were substantially weightier than the majority suggested because Section 632(a)(1)(B) bars future constitutionally protected broadcast speech, impairs listeners' right to diverse programming, and singles out a well-defined, limited class of speakers for an unusually harsh sanction. App. 32a-34a. Second, Judge Tatel noted, while purporting to apply more than minimal scrutiny, the majority, in effect, applied a rational basis standard, treating Section 632(a)(1)(B) as presumptively valid and disre-

garding the many ways in which it was poorly tailored. App. 35a-42a.

Applying "more than" minimal scrutiny, Judge Tatel concluded that Section 632(a)(1)(B) was "poorly aimed" at ensuring truthful and reliable LPFM licensees and preventing future broadcast-related violations. App. 42a. As in his panel opinion, Judge Tatel found the statute impermissibly under- and over-inclusive. App. 35a-42a.

Addressing the majority's claim that there was a "reasonable fit" between Section 632(a)(1)(B) and the asserted government interests (App. 40a), Judge Tatel asked: "Even given the many violations that occurred during the movement to end the low power ban, what is it about unlicensed microbroadcasters, alone among applicants who have committed offenses, that requires a broadcasting 'mark of Cain' to deter future offenses?" App. 40a.

Finally, Judge Tatel took issue with Judge Randolph's standing analysis. He noted that, contrary to Judge Randolph's assumption, petitioner argued that Section 632(a)(1)(B) could not be constitutionally applied to anyone, including petitioner. App. 46a. Judge Tatel further asserted that petitioner had standing to make a facial overbreadth challenge, given the statute's "classic chilling effect" on third parties. App. 47a.

REASONS FOR GRANTING THE WRIT

This petition should be granted because the decision below—upholding an unprecedented sanction that seriously undermines important First Amendment values—directly conflicts with this Court's First Amendment and Equal Protection jurisprudence.

Without debating less-burdensome alternatives, Congress has automatically and permanently disqualifying former unlicensed microbroadcasters from holding LPFM licenses—the only broadcast licenses practicably available to them—despite the absence of any record evidence that such a draconian sanction is necessary to ensure the selection of truthful and reliable LPFM licensees or deter future unlicensed broadcasting. While automatically and permanently disqualifying even former unlicensed microbroadcasters who only briefly or long ago engaged in unlicensed broadcast operations or who have become model citizens since ceasing their unlicensed broadcast operations, Congress has left civil wrongdoers, felons, and inveterate regulatory violators other than unlicensed microbroadcasters eligible for such licenses.

The court of appeals, in effect, applied minimal scrutiny to Section 632(a)(1)(B), treating the statute as presumptively constitutional, ignoring the ready availability of an equally effective, less-burdensome alternative, and brushing aside the statute's remarkable under- and over-inclusiveness. This was clear error.

While "permitt[ing] more intrusive regulation of broadcast speakers than of speakers in other media," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994), this Court has consistently applied intermediate scrutiny to "non-structural" broadcast regulations, including broadcast regulations of mere commercial speech.[5] *See, e.g.*,

[5] "Structural" regulations "employ antitrust concepts, limitations on cross-ownership, and the like to ensure diversity in broadcasting while minimizing government attention to broadcast content." *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 458 n.26 (1980). The court of appeals correctly held that Section 632(a)(1)(B) did not fall in this cat-

FCC v. League of Women Voters of Cal., 468 U.S. 364, 399 (1984) (invalidating ban on editorializing by federally-funded NCE stations because statute was "not narrowly tailored to address any of the Government's suggested goals"); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (striking down ban on broadcast advertising of private casino gambling in Louisiana, where casino gambling was legal, in part because ban lacked "narrow tailoring" to serve Government's stated aims); *United States v. Edge Broad. Co.*, 509 U.S. 418, 429-31 (1993) (upholding ban on broadcast advertising of lottery information in non-lottery states *after* finding ban narrowly tailored to serve Government's asserted interests).

Section 632(a)(1)(B) too warrants intermediate scrutiny, given the important First Amendment values at stake. First, the statute bars future constitutionally protected broadcast speech (including core political expression) ostensibly to prevent future violations of broadcast laws and regulations. This Court has made clear that "broad prophylactic" rules "in the area of free expression" are "suspect." *Edenfeld v. Fane*, 507 U.S. 761, 776, 777 (1993) (quoting *NAACP v. Buttons*, 371 U.S. 415, 438 (1963)).

Second, Section 632(a)(1)(B) "single[s] out" a small segment of the press (unlicensed microbroadcasters) "for special treatment." *Turner Broad. Sys.*, 512 U.S. at 640. Because such laws "'pose a particular danger of abuse by

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egory. App. 12a. Indeed, by disqualifying many individuals and groups who seek to become new sources of local radio programming, Section 632(a)(1)(B) lessens, rather than promotes, diversity in broadcasting.

the State,' [they] are always subject to at least some degree of heightened First Amendment scrutiny." *Id.* at 640-41 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

Third, Section 632(a)(1)(B) debars hundreds, if not thousands, of individuals and groups who, while on the air (without licenses), became vital sources of local news, music, educational programs and commentary. The statute thus potentially impairs listeners' "paramount" First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

We now show that Section 632(a)(1)(B) cannot survive intermediate scrutiny.

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT THE AVAILABILITY OF LESS-BURDENSOME ALTERNATIVES IS A RELEVANT CONSIDERATION UNDER INTERMEDIATE SCRUTINY

The existence of "obvious less-burdensome alternatives . . . is certainly a relevant consideration in determining whether the 'fit' between [the government's] ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n.13 (1993). Indeed, the availability of such alternatives signals that the fit "may be too imprecise to withstand [intermediate] scrutiny." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring). That is the case here.

There is nothing in the RBPA's sparse legislative history that even remotely suggests that the FCC's traditional character qualification policies for broadcast licensees (*see* pp. 4-6 *supra*) would prove less effective than Section 632(a)(1)(B) in ensuring compliance with broadcast laws and regulations. Simply put, Congress enacted the RBPA without debating or holding hearings on the adequacy of this alternative. Thus, "[f]or all [one] know[s] from this legislative] record," the FCC's traditional character qualification policies for broadcast licensees "would be extremely effective" in achieving regulatory compliance. *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989).

True, the FCC departed from these policies in deciding to automatically and permanently disqualify unlicensed microbroadcasters who did not timely shut down their stations. *Low Power Report and Order*, 15 F.C.C. 2d at 226. App. 109a. The FCC, however, never even acknowledged, let alone explained why, that departure was necessary to ensure regulatory compliance. (*See* p. 10, *supra*.) In short, the FCC "change[d] course" without providing the "reasoned analysis" necessary to justify that change. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (internal citation and quotation omitted).

Though noting that the FCC's traditional character qualification policies would likely disqualify LPFM license applicants who have committed "serious crimes" (App. 15a), the court of appeals inexplicably failed to consider that the very same policies likely would also disqualify unlicensed microbroadcasters who, in fact, may lack the requisite truthfulness and reliability to hold LPFM licenses. In so doing, the court of appeals abdicated its "obliga-

tion to exercise independent judgment when First Amendment rights are implicated" in order to assure that, "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys.*, 512 U.S. at 666.

In sum, given the ready availability of an equally effective, less-burdensome alternative, the fit between means and ends is too imprecise for Section 632(a)(1)(B) to survive intermediate scrutiny. *Cf. League of Women Voters*, 468 U.S. at 388-89, 395 (ban on editorializing by federally funded NCE stations lacked narrow tailoring, in part because other regulations in place, or that could be adopted, would prevent such stations from becoming government propaganda outlets); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 192 (ban on broadcast advertising of private casino gambling in Louisiana, where such gambling was legal, lacked narrow tailoring because "practical and nonspeech-related forms of regulation . . . could more directly alleviate some of the social costs of casino gambling").

II.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT GROSSLY UNDERINCLUSIVE STATUTES CANNOT SURVIVE INTERMEDIATE SCRUTINY

"Exemptions from an otherwise legitimate regulation of a medium of speech may . . . diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). Indeed, if left unexplained, such exemptions "cast serious

doubt" on the government's rationale. *United States v. National Treasury Employees Union*, 513 U.S. 454, 473 (1995). Here, 632(a)(1)(B)'s narrow focus on one class of misconduct and one class of broadcast licenses significantly undermines the asserted rationale for the statute's unprecedented draconian sanction.

While automatically and permanently disqualifying unlicensed microbroadcasters from holding LPFM licenses, Section 632(a)(1)(B) leaves civil wrongdoers, felons, and even inveterate regulatory violators other than unlicensed microbroadcasters free, under the FCC's traditional character qualification policies for broadcast licensees, to demonstrate that they can reliable operate LPFM (or full power FM) stations in the public interest, notwithstanding their past misconduct. There is nothing in the RBPA's sparse legislative history or the FCC's LPFM rulemaking record to explain why serious misconduct other than unlicensed broadcasting is not equally as disqualifying, if not more so. Nor could there be.[6]

In response to these disparities, the court of appeals initially stated that murder, rape, child molestation, and the like are "not particularly associated with the harms caused by unlicensed broadcasting." App. 14a. All applicants who have engaged in serious misconduct, however, pose a risk of unreliable broadcast behavior, regardless of the nature of the misconduct. *Cf. Policy Regarding Character Qualifications in Broad. Licensing*, 5 F.C.C. Rcd. 3252, 3252

[6] The FCC, for example, has long regarded a broadcast licensee's misrepresentations to the FCC as "serious breaches of trust" that trigger "immediate concerns over the licensee's ability to be truthful in future dealings with the [FCC]." *Character Policy Statement*, 102 F.C.C. 2d at 1209, 1211.

(1990) ("we believe that a propensity to comply with the law generally is relevant to the [FCC's] public interest analysis, and that an applicant's willingness to violate other laws, and in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies"). The mere fact that serious misconduct may be subject to other penalties (App. 14a) does not diminish that risk.

The court of appeals further posited that Congress could reasonably conclude that other violations of law reflect less directly than does unlicensed microbroadcasting upon one's qualification to hold an LPFM license. App. 15a. As Judge Tatel observed, however, it is "not at all obvious that unlicensed microbroadcasters who broadcast briefly and years ago and who shut down promptly when told to do so present any greater risk of unreliable behavior than applicants who recently obtained their licenses through fraud or misrepresentation or who perpetrated the 'most amoral skein of detected villainy in domestic broadcast history.' If anything, the Weiners of the world should be of greater concern." App. 38a-39a.

Section 632(a)(1)(B)'s remarkable underinclusiveness is further evident from the statute's failure to punish misconduct by *licensed full power* broadcasters giving rise to precisely the same harm caused by unlicensed microbroadcasting. As Judge Tatel wrote: "Whether caused by unlicensed microbroadcasters or by licensed [full power] broadcasters operating on someone else's frequency [or exceeding their power limits], frequency interference is frequency interference. Indeed, unauthorized full power broadcasters, whose range and power far exceed that of

microbroadcasters, would seem to present a greater risk of interference." App. 39a.

In sum, given that Congress has ignored a broad range of misconduct giving rise to the same character concerns that motivated it to enact Section 632(a)(1)(B), it is "serious[ly] doubt[ful]" that the statute is even remotely necessary to serve the government interest in ensuring regulatory compliance. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). *Cf. League of Women Voters*, 468 U.S. at 396 (claim than ban on editorializing by federally-funded NCE stations was necessary to prevent stations from becoming privileged outlets for political and ideological views was belied by fact that stations remained free, despite ban, to air such views in other programming); *National Treasury Employees Union*, 513 U.S. 454, 476-77 (claim that ban on honoraria by government employees, even when unrelated to official duties, was reasonable response to threat that such honoraria posed to operational efficiency was undermined by exemptions for wide variety of performances and writings having no nexus to official duties).

III.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT GROSSLY OVERINCLUSIVE STATUTES CANNOT SURVIVE INTERMEDIATE SCRUTINY

Congress "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Measured by the government

interest in ensuring compliance with broadcast laws and regulations, Section 632(a)(1)(B) is "significantly overinclusive." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

As Judge Tatel observed, Section 632(a)(1)(B) covers many "circumstances only marginally related to the purpose of increasing regulatory compliance," automatically and permanently disqualifying, among others, unlicensed microbroadcasters who only briefly or long ago engaged in unlicensed broadcast operations, unlicensed microbroadcasters who have become model citizens after ceasing their illegal activity, unlicensed microbroadcasters who (like petitioner) merely wish to serve on an LPFM station's multi-member board, and, "most tellingly," unlicensed microbroadcasters who were unaware that they were violating the law at the time of their unlicensed broadcasts. App. 42a-43a.

In rejecting these concerns, the court of appeals simply stated—without analysis—that "[a]ny unlicensed broadcasting demonstrates a wilful disregard of the most basic rule of federal broadcasting regulation." App. 16a. That, however, hardly establishes that an unlicensed microbroadcaster forever lacks the requisite character qualifications to hold an LPFM license. *Cf. Schware v. Board of Bar Examiners of N.M.*, 353 U.S. 232, 246 (1957) ("In the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies—the arrests for offenses for which petitioner was neither tried nor convicted, the use of an assumed name many years ago, and membership in the Communist Party during the 1930's—cannot be said to raise substantial doubts about his present moral character"); *Alessandro Broad Co.*, 99 F.C.C. 2d 1,

11 n.13 (1984) (declining to disqualify applicant whose controlling shareholder had been convicted of second degree murder because crime was "isolated event that occurred in the remote past" and state authorities had declared shareholder "rehabilitated," thus removing any "predictive nexus between the past crime and his current and future fitness to be a [broadcast] licensee").

In sum, because Section 632(a)(1)(B) burdens substantially more speech than necessary to serve the articulated goals, the statute is impermissibly overinclusive. *Cf. League of Women Voters*, 468 U.S. at 392-93 (holding that ban on editorializing by federally funded NCE stations was impermissibly overinclusive, in terms of government interest in preventing stations from becoming government propaganda outlets, because it covered "a potentially infinite variety of speech, most of which [was unrelated] to governmental affairs, political candidates, or elections"); *Simon & Schuster*, 502 U.S. at 121 (holding Son of Sam law impermissibly overinclusive, in terms of government interest in ensuring that victims are compensated from proceeds of crime, because statute applied to convicted criminals' literary works on any subject); *Thomas v. Chicago Park District*, 534 U.S. 316, 325 (2002) (rejecting challenge to ordinance permitting (but not requiring) denial of application to parade in public park for, among other reasons, violation of the terms of prior permit, because "[t]he prophylaxis achieved by insisting upon a rigid, no-waiver [rule] would be far outweighed . . . by the accompanying senseless prohibition of speech").

IV.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT STATUTES BURDENING THE FIRST AMENDMENT RIGHTS OF A SINGLE CLASS OF SPEAKERS MUST BE NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENT INTEREST

Section 632(a)(1)(B) sets former unlicensed microbroadcasters apart, denying them the opportunity afforded other broadcast license applicants who have committed prior misconduct to show that they can operate a broadcast station in the public interest despite their past misconduct. Where, as here, a statute burdens the First Amendment rights of a single class of broadcast speakers, the government must show that the statutory classification is "'narrowly tailored'" to serve a "'substantial'" governmental interest. *Community Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 99, 101 (1972)).

For the very same reasons that Section 632(a)(1)(B) lacks the narrow tailoring to survive First Amendment review, so too it lacks the narrow tailoring to survive Equal Protection review. Because the court of appeals erred in rejecting petitioner's First Amendment challenge to Section 632(a)(1)(B), it also erred in rejecting petitioner's Equal Protection challenge to the statute.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT T. PERRY
Counsel of Record
BARBARA J. OLSHANSKY
Center for Constitutional Rights
666 Broadway, Seventh Floor
New York, New York 10012
(212) 614-6480

Counsel for Petitioner

May 1, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1100
September Term, 2002
Filed: January 31, 2003

GREG RUGGIERO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

Before: GINSBURG, *Chief Judge*, and
EDWARDS, SENTELLE, HENDERSON, RANDOLPH,
ROGERS, TATEL, and GARLAND, *Circuit Judges*,
sitting en banc.

JUDGMENT

This cause was reconsidered by the court en banc on the record compiled before the Federal Communications Commission, the briefs of the parties, and the arguments by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED that the decision in *Ruggiero v. FCC*, 1323 (D.C. Cir. 2002), be adopted insofar as it upholds the jurisdiction of the court and vacated insofar as it holds unconstitutional the character qualification of § 632(a)(1)(B) of the Radio Broadcasting Preservation Act of 2000. It is

FURTHER ORDERED AND ADJUDGED that the petition for review be denied for the reasons set forth in the opinion issued this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ MICHAEL C. MCGRAIL
Michael C. McGrail
Deputy Clerk

Date: January 31, 2002

Opinion for the court en banc filed
by Chief Judge Ginsburg.
Concurring opinion filed by Circuit Judge Randolph.
Concurring opinion filed by Circuit Judge Rogers.
Dissenting opinion filed by Circuit Judge Tatel.

[STAMP:]
MANDATE Pursuant to the provisions of Fed. R. App.Pro.41(a)
ISSUED: 2.19.03
BY: /s/ MICHAEL C. MCGRAIL Deputy Clerk
ATTACHED: ___ Amending Order ___ Opinion ___ Order on Costs

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1100

Argued En Banc September 17, 2002
Decided January 31, 2003

GREG RUGGIERO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

ROBERT T. PERRY argued the cause and filed the briefs for petitioner. With him on the brief was BARBARA J. OLSHANSKY.

JACOB M. LEWIS, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were ROBERT S. GREENSPAN and MARK S. DAVIES, Attorneys, and JANE E. MAGO, General Counsel, Federal Communications Commission, and C. GREY PASH, JR., Counsel.

Before: GINSBURG, *Chief Judge*, and
EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, *Circuit Judges*, sitting en banc.

Opinion for the Court by *Chief Judge* GINSBURG, with whom *Circuit Judges* EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and GARLAND join.

Concurring opinion filed by *Circuit Judge* RANDOLPH.
Concurring opinion filed by *Circuit Judge* ROGERS.
Dissenting opinion filed by *Circuit Judge* TATEL.

GINSBURG, *Chief Judge:*

This petition for review challenges the constitutionality of the character qualification provision of the Radio Broadcasting Preservation Act of 2000, which makes ineligible for a low-power FM (LPFM) radio license anyone who engaged in "the unlicensed operation of any station in violation of . . . the Communications Act of 1934." Pub. L. No. 106-553, 114 Stat. 2762, § 632(a)(1)(B). The petitioner raises a facial challenge to the statute and to the regulations that implement it, asserting that they are overinclusive or, alternatively, underinclusive, in violation of the First Amendment to the Constitution of the United States. A divided panel granted the petition. The full court then vacated the judgment issued by the panel and reheard the case en banc. We now uphold the constitutionality of the character qualification and deny the petition for review.

I. Background

Since 1927 the Congress has prohibited any person from operating a radio station without a license issued by the Federal Communications Commission (or its predecessor, the Federal Radio Commission). *See* 47 U.S.C. § 301. The Commission is to grant a broadcast license only if the "public interest, convenience, and necessity would be served," 47 U.S.C. § 309(a), and only if the applicant "set[s] forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station." 47 U.S.C. § 308(b).

In 1948, the Commission first licensed noncommercial LPFM stations operating at a maximum of ten watts. Some 30 years later, when the Commission determined that high-power FM stations could use the channels more efficiently by "serv[ing] larger areas, and bring[ing] effective noncommercial educational radio service to many who . . . lack[ed] it," *Changes in the Rules Relating to Noncommercial Educ. FM Broad. Stations*, 69 F.C.C.2d 240, ¶24 (1978), *modified*, 70 F.C.C.2d 972 (1979) (codified at scattered sections of 47 C.F.R.), the Commission stopped licensing LPFM stations and required most existing LPFM stations to move to commercial frequencies or to upgrade to at least 100 watts. *Id.* at ¶¶11-32.

Thereafter, numerous individuals and entities began operating LPFM stations without a broadcast license. In many cases these so-called "pirate" broadcasters operated their stations in open defiance of the Commission's ban on LPFM broadcasts. In response, the Commission dedicated considerable resources to enforcing the license requirement. Notwithstanding, however, the array of powers the

Commission had to combat unlicensed broadcasting, including the authority to seek an injunction, 47 U.S.C. § 401(b), to issue a cease-and-desist order, 47 U.S.C. § 312(b), to seize equipment used in unlicensed broadcasting, 47 U.S.C. § 510(a), and to impose a monetary forfeiture, 47 U.S.C. § 503(b), the problem persisted and indeed grew worse in the 1990s. In 1998, 1999, and the first two months of 2000 the Commission shut down, on average, more than a dozen unlicensed radio stations each month. *FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities: Hearing on H.R. 3439 Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. 85 (2000). In that same period unlicensed radio operations using uncertified equipment disrupted air traffic control communications at Sacramento and interfered with such communications at the Miami and West Palm Beach airports. Creation of a Low Power Radio Serv., 14 F.C.C.R. 2471, ¶65 (1999) (Notice of Proposed Rule Making) (hereinafter Low Power Proposal). Therefore, it was clear to the Commission that action needed to be taken to stop unlicensed broadcasting.

In 1999 the Commission proposed to modify its low-power radio rules and sought public comment upon whether it should "create two classes of low power radio service, both of which would operate in the existing FM radio band: a 1000-watt primary service and a 100-watt secondary service." *Id.* at ¶1. The Commission also sought comment upon whether it should establish "a third, 'micro-radio' class of low power radio service that would operate in the range of 1 to 10 watts." *Id.* at ¶1.

After receiving many comments concerning the Low Power Proposal, the Commission issued an order creating

new 100-watt and 10-watt classes of LPFM stations. *Creation of Low Power Radio Serv.*, 15 F.C.C.R. 2205, ¶11, 2000 WL 85304 (Report and Order). The Commission also stated that it would accept a low-power application from an applicant who had broadcast without a license in the past if the applicant certified under penalty of perjury that it had ceased such operations within 24 hours of being directed to do so by the Commission and no later than the deadline (February 26, 1999) set out in the Low Power Proposal. *Id.* at ¶¶53-54. This licensing condition for broadcast pirates was applicable both to individuals and to corporate applicants, including the applicant's officers and directors. *Id.* at ¶54.

The Commission's proposal conditionally to license former pirates was received with dismay in the Congress. Senator Gregg, who introduced a bill to repeal the LPFM rules in toto, argued against the Commission's character qualification in particular: "mak[ing] formerly unlicensed, pirate radio operators eligible for LPFM licenses," he said, would "reinforce[ ] their unlawful behavior and encourage[ ] future illegal activity by opening the door to new unauthorized broadcasters." 146 Cong. Rec. S613-02 (daily ed. Feb. 10, 2000). Congressman Oxley made the same argument at a House committee hearing on a similar bill. *See* House Hearing, 106th Cong. at 4. *See also* H.R. Rep. No. 106-567, 106th Cong., at 8 (2000) (House Committee on Commerce concluded "that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public, and those individuals or groups should not be permitted to receive licenses in the LPFM service").

The Congress ultimately responded to the Commission's decision by enacting the Radio Broadcast Preservation Act of 2000 (RBPA), Pub. L. No. 106-553, 114 Stat. 2762, § 632, which among other things directed the Commission to modify its rules to "prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934." *Id.* § 632(a)(1)(B). In contrast to the Commission, that is, the Congress barred all low-power pirates from obtaining an LPFM license regardless whether or when they had ceased to operate unlawfully.

As directed, the Commission modified its rules to implement the more stringent character qualification required by the Congress. *Creation of Low Power Radio Serv.*, 16 F.C.C.R. 8026, ¶ 10, 2001 WL 310997 (2001) (Second Report and Order). The resulting regulation provides that "[n]o application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner including individually or with persons, groups, organizations or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934." 47 C.F.R. § 73.854.

Ruggiero, an admitted former pirate, sought review in this court of the Second Report and Order, arguing that the character qualification on its face violates the First Amendment. A divided panel of this court held the RBPA and the implementing regulation unconstitutional. *Ruggiero v. FCC*, 278 F.3d 1323 (D.C. Cir. 2002). We granted the Commission's petition for rehearing en banc and vacated the prior judgment. Having now reheard the case

en banc, we adopt the decision of the panel concerning the jurisdiction of the court, *id.* at 1327-29, but on the merits hold that the character qualification provision is neither overinclusive nor underinclusive in violation of the First Amendment.

II. Analysis

Before we turn to the merits of the constitutional question, we must identify the level of first amendment scrutiny appropriate to the nature of the statute being challenged.

A. Standard of Review

Ruggiero asserts that under *FCC v. League of Women Voters*, 468 U.S. 364, 399,104 S.Ct. 3106, 3127, 82 L.Ed.2d 278 (1984), we are to apply "intermediate scrutiny" to all broadcast regulations other than those that are purely "structural," that is, those involving the "where" and "when" of broadcasting. Under the rubric of intermediate scrutiny we would have to determine whether the LPFM character qualification is "narrowly tailored to further a substantial governmental interest." *Id.* at 380, 104 S.Ct.at 3118. Alternatively, Ruggiero asserts the court should apply the "heightened rational basis scrutiny" to which we alluded, but had no occasion to apply, in *News America Publishing Inc. v. FCC*, 844 F.2d 800, 814 (D.C. Cir. 1988). For its part, the Commission argues we should apply the "rational basis standard" associated with minimal scrutiny and hence need only determine whether the character qualification is "a reasonable means of promoting the public interest." *FCC v. National Citizens Comm.*

for Broad., 436 U.S. 775, 802, 98 S.Ct. 2096, 2115, 56 L.Ed.2d 297 (1978) (*NCCB*).

We conclude, as did the panel that first heard this case, that the appropriate standard of review occupies a ground somewhere between the minimal scrutiny advocated by the Commission and the intermediate scrutiny proposed by Ruggiero. First, we reject Ruggiero's principal argument, namely, that the character qualification is content-based and therefore, pursuant to *League of Women Voters*, subject to intermediate scrutiny. At issue in that case was a statute prohibiting noncommercial educational stations from editorializing, 47 U.S.C. § 399, a ban "defined solely on the basis of the content of the suppressed speech." 468 U.S. at 383, 104 S.Ct. at 3119. Because the object of the anti-editorial statute was content, the Supreme Court gave it intermediate scrutiny, asking whether the restriction was narrowly tailored to advance a substantial government interest. The ban on editorials failed that test twice over: it was both overinclusive and underinclusive. The ban was overinclusive in that it prohibited speech "on topics that [did] not take a directly partisan stand or that ha[d] nothing whatever to do with . . . government," *id.* at 395, 104 S.Ct. at 3125, and thus did not implicate the Government's stated interests in (a) protecting broadcasters from government interference and (b) preventing the public from assuming the editorials represented the view of the Government. The statute was underinclusive in that broadcasters could still present controversial or partisan views in news and other programming. *Id.* at 396,104 S.Ct. at 3125-26. *See also Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 119 S.Ct.2d 161 (1999) (applying intermediate scrutiny to ban on broadcast advertising of

private casino gambling as restriction on content of commercial speech).

In contrast, as the Commission correctly points out, the character qualification at issue in this case applies without regard to any content the applicant may have broadcast unlawfully or might be expected to broadcast if a license were issued to him. The character qualification is triggered solely by the applicant's conduct, specifically, having "engaged . . . in the unlicensed operation of any station in violation of section 301 of the Communications Act." Pub. L. No. 106-553, 114 Stat. 2762, § 632(a)(1)(B). Contrary to Ruggiero's brief, the character qualification is not directed at the alleged "viewpoint espoused by many pirates" that "civil disobedience in the form of unlicensed broadcasting [was] . . . necessary to prod the FCC to rescind its longstanding ban on low power FM radio broadcasting." Rather, the statute on its face is based solely upon the applicant's prior lack of compliance with the licensing requirement; the character qualification applies equally to all unlicensed broadcasters regardless of the motivation for, or the message disseminated by, their illegal broadcasting. *See Employment Div. v. Smith*, 494 U.S. 872, 878, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990) ("[I]f prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended"). *See also Kahn v. United States*, 753 F.2d 1208, 1216 (3d Cir. 1985) (prosecution of taxpayer for filing fraudulent tax return, as act of civil disobedience, did not violate First Amendment; "penalty was imposed because the taxpayer's *conduct* failed to comply with the requirement of the tax laws that she properly report her tax liability, not because she

expressed unpopular political views") (emphasis in original).

Though we reject Ruggiero's assertion that intermediate scrutiny applies, we do not embrace the Commission's position that only minimal scrutiny is warranted. Minimal scrutiny is appropriate to the indirect effect upon speech that may attend "structural" regulation of the broadcast industry. *See Leflore Broad. Co. v. FCC*, 636 F.2d 454, 458 n.26 (D.C. Cir. 1980) (structural regulations "insure diversity in broadcasting while minimizing government attention to broadcast content"). In *NCCB*, upon which the Commission relies, the Supreme Court gave only minimal scrutiny to and upheld the Commission's newspaper-broadcast cross-ownership rule, which prohibited common ownership of a broadcast station and a daily newspaper in the same community. 436 U.S. at 779, 98 S.Ct. at 2104. The cross-ownership rule, however, merely constrained the newspaper publisher's choice of the community in which to own a radio or television station; it did not prohibit the publisher from broadcasting altogether. *Id.* at 800, 98 S.Ct. at 2115 ("Under the regulations . . . a newspaper owner need not forfeit anything in order to acquire a license for a station located in another community"). The RBPA, in contrast, makes the pirate broadcaster ineligible to obtain an LPFM license—the only type of license practicably available to most individuals—in any community. It is the would-be speaker's inability to broadcast at all that takes this case outside the "structural" framework and makes minimal scrutiny insufficiently rigorous to protect the freedom of speech protected by the First Amendment.

Having rejected each party's favored standard of review, we, like the panel that first heard this case, "find ourselves

in a middle ground, sure only that the appropriate standard is neither *NCCB*'s minimal scrutiny nor *League of Women Voters*' intermediate scrutiny." 278 F.3d at 1331. Clearly, as Ruggiero suggests in his alternative argument, something more than minimal rationality is required to uphold the statute. *Id.*; *News America*, 844 F.2d at 814. We need not be more precise, however, because we conclude that the character qualification provision is reasonably tailored to satisfying a substantial government interest, and that is surely enough to uphold a prohibition upon broadcast speech that, although complete within its limited sphere, is in no respect content-based.

B. Under- and Overinclusiveness

As the Commission points out, unlicensed LPFM transmissions can not only prevent the public from receiving the signals of licensed broadcasters, *see*, *e.g.*, *United States v. Any and All Radio Station Transmission Equip.*, 204 F.3d 658 (6th Cir. 2000) (interference complaint against pirate by licensed FM station); they can also, as we have seen, interfere with "public safety communications and aircraft frequencies." Low Power Proposal, 14 F.C.C.R. 2471, at ¶65. Because the Government has chosen to address the problem of interference through socialization and administrative allocation of the right to broadcast, rather than relying upon the common law, *see* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 148-52 (1990); and Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) (treating problem of interference as he would later treat other incompatible uses in *The Problem of Social Cost*, 3 J.L. &

ECON. 1 (1959)), there can be no doubt it has a substantial interest in ensuring compliance with the Communications Act and in particular with its central requirement of a license to broadcast.

Ruggiero argues, nonetheless, that the character qualification is impermissibly underinclusive because it does not disqualify persons guilty of "serious misconduct other than piracy—murder, rape, child abuse, bribery, fraud, illegal wiretapping, antitrust violations, [and] lying to the FCC, to give but a few examples." He continues in the same vein:

> Because Congress has ignored a broad range of misconduct "giving rise to precisely the same harm that supposedly motivated it to [enact the character qualification provision]," *Sanjour v. EPA*, 56 F.3d [85,] 95 [(D.C. Cir. 1995) (en banc)], it is "serious[ly] doubt-[ful]" that the character qualification provision substantially advances the governmental interest in increasing compliance with broadcast laws and regulations in a meaningful way.

This is nonsense on stilts.

First, Ruggiero's factual premise is incorrect, not to say absurd. The Congress has not "ignored" misconduct "giving rise to precisely the same harm" that caused it to impose the character qualification. Not only are murderers, rapists, child molesters, and the like not particularly associated with the harms caused by unlicensed broadcasting, the harms that these malefactors do cause are not without other and more severe penalties (state or federal) than ineligibility for an LPFM license.

Second, it was entirely reasonable for the Congress to make the policy judgment that all broadcast pirates, and only broadcast pirates, should be disqualified categorically

from holding an LPFM license while leaving to the Commission the discretion to evaluate on a case-by-case basis the myriad other ways an applicant's character can be drawn into question. All broadcast pirates, by definition, have violated already the requirement of obtaining a broadcast license. As Judge Henderson pointedly asked in her dissent from the decision of the panel, "[w]hat could be more reasonable or logical than to suspect that those who ignored the Commission's LPFM broadcast regulations in the past are likely to do so in the future and therefore to head them off[?]" 278 F.3d at 1335. Indeed, even as it adopted its own more forgiving approach to pirates before the Congress enacted the RBPA, the Commission acknowledged that "past illegal broadcast operations reflect on that entity's proclivity to deal truthfully with the Commission and to comply with our rules and policies, and thus on its basic qualifications to hold a license." 15 F.C.C.R. 2205, at ¶54. Thus the Congress could reasonably conclude that other violations of law simply do not reflect as directly upon the offender's qualification to hold an LPFM license. Moreover, insofar as such criminals may seek LPFM (or indeed any type of broadcast) licenses, they are, as the Commission notes, "subject to the FCC's [general] character qualification policy, under which they are likely to be disqualified for such serious crimes in any event." *See Policy Regarding Character Qualifications in Broad. Licensing*, 102 F.C.C.2d 1179, ¶¶34-44, 1986 WL 292574 (1986); *see also*, *e.g.*, *In re Contemporary Media, Inc.*, 12 F.C.C.R. 14254, 1997 Wl 473323 (1997) (revocation of license and denial of application for new license because principal had been convicted of sexual abuse of children), *aff'd*, *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000). Therefore, we can hardly

say the Congress was prohibited by the First Amendment from responding to the discrete problem of broadcast piracy—which goes to the heart of the Communications Act, namely, preventing interference caused by unlicensed broadcasting—with a categorical ban.

Third, even if it could be thought that categorically disqualifying murderers and the like from getting an LPFM license would deter some unlicensed broadcasting, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict . . . the speech of more people, could be more effective." *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995) (emphasis in original). In sum, we agree with the Commission's position that the character qualification provision of the RBPA is not underinclusive but is, rather, because it targets those who have already violated the broadcast license requirement, reasonably tailored to further the Government's substantial interest in minimizing unlicensed LPFM broadcasting.

We reject also Ruggiero's claim that the character qualification is overinclusive because it prohibits all pirates, including those good pirates who stopped broadcasting illegally when ordered to do so, and those "former pirates [who] subsequently have become model citizens," from obtaining a license. All unlicensed LPFM broadcasters violated the Communications Act. Any unlicensed broadcasting demonstrates a willful disregard of the most basic rule of federal broadcasting regulation. *See* H.R. Rep. No. 106-567, at 8 (2000); *Creation of Low Power Radio Service*, 15 F.C.C.R. 19208, ¶96, 2000 WL 1434686 (2000)

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* Although necessarily couched in terms of under—and overinclusiveness, our dissenting colleague's concern seems really to be with what he sees as the disproportionality of disqualifying LPFM pirates from holding an LPFM license, as compared with the consequences

(Opinion and Order). The Congress did not hit wide of the mark, therefore, when it treated all pirates alike.*

C. Equal Protection

Ruggiero also claims that because the character qualification "imposes special burdens on the First Amendment rights of a single class of speakers (pirates)," and is not " 'narrowly tailored' to serve a 'substantial' governmental interest," it violates the Equal Protection guarantee of the Fifth Amendment. This claim fails for the same reasons the first amendment claims fail: the legislative classification, which treats former pirates differently from others, is rea-

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visited upon other unlicensed broadcasters and other offenders against the broadcast regulatory regime. *See* dissent at 245, asking "why does the RBPA's automatic and permanent ban not extend to unlicensed full power broadcasters"; and at 246, where he "agree[s] that deterrence is a substantial governmental interest, but [asks] why impose a lifetime ban?," which he refers to as "a broadcasting 'mark of Cain.' "

The judgment that one offense is more serious than another, like the judgment that a punishment of a certain severity is warranted for a particular offense, is not for the judiciary to make. Cf. Hutchins v. District of Columbia, 188 F.3d 531, 543 (D.C. Cir. 1999) (noting that under intermediate scrutiny, "the [Government] is not obliged to prove a precise fit between the nature of the problem and the legislative remedy," and rejecting claim that curfew was unconstitutional because it did not include 17-year-olds); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 850 (4th Cir. 1998) (applying intermediate scrutiny and rejecting claim that city's decision to exclude 17-year-olds from curfew was unconstitutional, because "[i]t is not the function of a court to hypothesize independently on the desirability or feasibility of any possible alternative[s] to the statutory scheme" (quoting *Lalli v. Lalli*, 439 U.S. 259, 274, 99 S.Ct. 518, 528, 58 L.Ed.2d 503 (1978))). Our concern in this case is limited to whether the Congress has reasonably tailored the character qualification to fit the substantial government interest it is intended to serve.

sonably tailored to the government's substantial interest in protecting the broadcast spectrum.

Although equal protection analysis focuses upon the validity of the classification rather than the speech restriction, "the critical questions asked are the same." *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc). We believe that the same level of scrutiny, heightened rational basis, is therefore appropriate in both contexts, and that the policy withstands such scrutiny.

III. Summary and Conclusion

The character qualification of the RBPA is a targeted response to the problem of pirate broadcasting, affects only those who violated the license requirement, and does so utterly without regard to the content of, or any view expressed by, their unlicensed broadcasts. There is a reasonable fit between the character qualification and the Government's substantial interests in deterring unlicensed broadcasting and preventing further violations of the regulations applicable to broadcasters. Accordingly, we hold that § 632(a)(1)(B) of the RBPA and the regulation implementing it do not on their faces violate the First Amendment. The petition for review is, accordingly,

Denied.

RANDOLPH, *Circuit Judge*, concurring:

Ruggiero has two First Amendment arguments. The first is that the statutory and regulatory bar against granting a low-power FM broadcast license to anyone who illegally operated without one is overbroad. The second is that the bar is underinclusive. I write separately because, in my

view, he is not entitled to make the first argument; and his second argument misconceives First Amendment doctrine.

Ruggiero has not applied to the FCC for a low-power license. He does not claim that his particular circumstances would warrant any special treatment. His attack is on the face of the statute and the implementing regulations. The lifetime bar is overbroad, he claims, because there may be applicants who "briefly or long ago engaged in unlicensed broadcast operations" and who now have become "model citizens." Petitioner's Br. at 26. The court rejects Ruggiero's claim on the ground that Congress rationally treated all pirates alike. Maj. op. at 12. Although I agree with the court, I believe another rationale leads to the same result.

Litigants ordinarily do not have standing to raise the rights of others. But in arguing about hypothetical third parties, Ruggiero is in effect invoking the familiar overbreadth doctrine, a staple of First Amendment jurisprudence. The doctrine, which may be traced to *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), permits facial challenges brought on the ground that the statute or regulation reaches constitutionally protected speech of parties not before the court. If the statute is substantially overbroad—that is, if it abridges protected speech of others in a good number of cases—the statute is unconstitutional. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612-15, 93 S.Ct. 2908, 2915-18, 37 L.Ed. 830 (1973). Overbreadth is sometimes viewed as an exception to traditional standing rules. *See Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 482-84,109 S.Ct. 3028, 3035-37, 106 L.Ed.2d 388 (1989); *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38, 120 S.Ct. 483, 488, 145 L.Ed.2d 451 (1999). The doctrine

rests on the assumption that if a statute could not be challenged for overbreadth, those not before the court would be chilled and would refrain from exercising their First Amendment rights. *See generally New York v. Ferber*, 458 U.S. 747, 766-73, 102S.Ct. 3848, 3359-63, 73 L.Ed.2d 1113 (1982). The "principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to someone else." *Fox*, 492 U.S. at 483, 109 S.Ct. at 3036. The Supreme Court has treated the doctrine as "'strong medicine'" to be employed "'only as a last resort.'" *Ferber*, 458 U.S. at 769, 102 S.Ct.at 3361 (quoting *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916-17).

The assumption underlying the overbreadth doctrine is inapplicable here. There is no possibility that third parties could be chilled in the exercise of their First Amendment rights. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 380-81, 97 S.Ct. 2691, 2707-08, 53 L.Ed.2d 810 (1977). We are not dealing with a criminal provision. All that is involved is filing an application with the FCC. Many pirates have done so. *Creation of a Low Power Radio Serv.*, 16 F.C.C.R. 8026, 8030, 8060, 2001 WL 310997 (2001). If they file applications in the future no harm will befall them. Their applications will simply be denied.

There is in short no chilling effect and Ruggiero therefore cannot invoke the overbreadth doctrine. *See Los Angeles Police Dep't*, 528 U.S. at 38-41, 120 S.Ct. at 488-90; *United States v. Hsia*, 176 F.3d 517, 523 (D.C. Cir. 1999). Without the benefit of the doctrine, he can succeed in his facial challenge only if he establishes "that no set of circumstances exists under which the Act [and the implementing regulations] would be valid," *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95

L.Ed.2d 697 (1987); *see Amfac Resorts, L.L.C. v. U.S. Dep't of Interior*, 282 F.3d 818, 826 (D.C. Cir.), *cert granted sub nom. Nat'l Park Hospitality Ass'n v. Dep't of Interior*, ___ U.S. ___,123 S. Ct. 549, 154 L.Ed.2d 424 (2002); *James Madison Ltd., by Hecht v. Ludwig*, 82 F.3d 1085, 1101 (D.C. Cir. 1996); *Chem. Waste Mgmt., Inc. v. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 693 (D.C. Cir. 1994) (en banc); *but see INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 188, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991). This is a burden Ruggiero admits he cannot meet. He has conceded that "some former pirates may lack the requisite character traits to hold [low-power] licenses." Petitioner's Reply Br. at 11. Ruggiero himself committed "three-year-long, nearly continuous violations of the licensing requirement," *Free Speech v. Reno*, No. 98 Civ. 2680 (MBM), 1999 WL 147743, at *11 (S.D.N.Y. Mar. 18, 1999), *aff'd sub nom. Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63 (2d Cir. 1999), and hardly qualifies as a pirate who "briefly" operated without a license.

As against this, the dissent has two responses. The first is that Ruggiero is not really mounting an overbreadth challenge; the second is that he is entitled to mount an overbreadth challenge because others may be chilled from applying for a license since this requires disclosing past broadcasting violations. Dissent at 14-16. Neither reply is correct. As to the nature of Ruggiero's argument, his attack is on the face of the statute and his claim is that the character qualification provision may not be applied to him because it would be unconstitutional to apply it to others not before the court. *E.g.*, Petitioner's Br. at 25-27; Petitioner's Reply Br. at 11. To put the matter more specifically, his argument—and the argument of the dissent—is

that the statute cannot be validly applied to Ruggiero or anyone else, no matter how egregious their past violations, because there may be others whose violations were not so egregious. Ruggiero never claims that his past violations were not egregious; we know that they were. This then is a classic statement of an overbreadth claim. *See*, *e.g.*, *Fox*, 492 U.S. at 482-84, 109 S.Ct. at 8085-87 The dissent says that Ruggiero is contending the statute "cannot constitutionally be applied to *anyone* because the statute *automatically* bars unlicensed microbroadcasters. . . ." Dissent at 14. That indeed is his contention. But what the dissent fails to grasp is that in every overbreadth attack, the plaintiff claims the statute is unconstitutional with respect to everyone; that is the very nature of this sort of attack and of the relief it seeks—invalidation of the statute on its face. *See*, *e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 322 (1999). The dissent also suggests that in order to make a successful overbreadth attack, the plaintiff must concede that the statute can validly be applied to him. Dissent at 14. The Supreme Court has never imposed any such requirement. The Court simply assumes that even if the statute is constitutional as applied to the plaintiff, or even if another provision could be drawn with greater specificity, the statute might nevertheless be invalid because of its effect on others. *Ferber*, 458 U.S. at 769.

In the alternative, the dissent claims there is a chilling effect on others because unlicensed broadcasters, in applying for a license, will be reluctant to disclose their past violations under penalty of perjury. Dissent at 15. The trouble for the dissent is that this particular chilling effect exists regardless whether the statute is upheld or struck down. Anyone applying for a license must be prepared to

divulge past violations of Commission rules. Not even the dissent contends that unlicensed broadcasting is irrelevant to the Commission's decision whether to grant a license. The Commission's 1986 comprehensive policy statement on character qualifications for licensees states that "as a general matter any violations of the Communications Act, Commission rules or Commission policies can be said to have a potential bearing on character qualifications." *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1209, 1986 WL 292574 (1986). And even before Congress passed the statutory bar we are considering, the Commission required applicants for low-power licenses to certify that they had not operated a station without a license. *Creation of a Low Power Radio Serv.*, 16 F.C.C.R. at 8030. The question here—a question the dissent does not address—is whether the statutory disqualification, by its very existence, deters more speech than did the preceding regime. And the answer to that question is clearly no. In short, the statute imposes no new "chilling effect" on the First Amendment rights of others, and as I have discussed, for that reason Ruggiero cannot bring an overbreadth challenge. Besides, the question here is not just whether there is some chilling effect—the claim must be that protected speech is being deterred. Yet there is no chilling effect on speech. "No one has a First Amendment right to a license," *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969), and it follows that no one has a First Amendment right to apply for a license.

As to underinclusiveness, Ruggiero's claim is that the bar violates the First Amendment because persons who have engaged in other sorts of serious misconduct are not automatically banned from obtaining a low-power license.

The court dispatches this argument on the ground that Congress's judgment was reasonable. Maj. op. at 10-11. I agree, but believe there is an alternative answer. The First Amendment does not impose "an 'underinclusiveness' limitation[,] but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 112 S.Ct. 2538, 2545, 120 L.Ed.2d 305 (1992). In other words, the relevance of a statute's underinclusiveness is that it may reveal discrimination on the basis of viewpoint or content, or may undercut the statute's purported non-discriminatory purpose. *See id.*; *Republican Party of Minn. v. White*, 536 U.S. 765, 122 S.Ct. 2528, 2537, 153 L.Ed.2d 694 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53, 114 S.Ct. 2038, 2043-44, L.Ed.2d 36 (1994). States could not, for instance, ban only fighting words that criticize a certain race. But the Court pointed out in *R.A.V.* that there would be no First Amendment problem whatever with a State's prohibiting obscenity in only certain media, although that would be underinclusive. 505 U.S. at 387, 112 S.Ct. at 2545. Here, there is no colorable claim that the statute and the regulation ban speech on the basis of content. As the court points out, the ban is based entirely on past violations, not on what the broadcaster said in the past or would say in the future if he were allowed to take to the airwaves again. Maj. op. at 244-245. I would therefore reject Ruggiero's underinclusiveness argument on this ground. For this reason I also view the dissent's discussion of underinclusiveness—which notes that not even murderers and rapists are automatically barred from obtaining a license—as beside the point.

ROGERS, *Circuit Judge*, concurring:

Upon consideration of this appeal by the en banc court, I generally join Judge Randolph's concurring opinion. Based on the standard established in *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988), as applied and explained in that case, I initially was persuaded by Ruggiero's argument challenging § 632(a)(1)(B) of the Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, 114 Stat. 2762, § 632(a)(1)(B), and its implementing rule, 47 C.F.R. § 73.854. However, upon further consideration, I am persuaded that Ruggiero does not have standing to raise the question of whether the statutory ban is overbroad. That conclusion, combined with the fact that the en banc court is not constrained by our precedent *News America*, precedent whose analysis I read to require a determination that the ban was unconstitutional, now leads me to a different result.

The court is in agreement that the *News America* standard of something "more than minimal scrutiny," 844 F.2d at 813, is the appropriate standard to be applied in Ruggiero's case, rejecting the rational basis test urged by the government. The court does not further define the standard and the majority, unlike the dissent, does not adopt the analysis of *News America*. In *News America*, the court did not address the question of overbreadth, resting instead on the extraordinary underinclusiveness of the statutory provision at issue that, in fact, applied to a single licensee. 844 F.2d at 810. The panel majority in Ruggiero adopted the *News America* standard because the statutory ban focused on a defined (albeit not closed) group "with the precision of a laser beam," *Ruggiero v. FCC*, 278 F.3d 1323, 1331 (D.C. Cir. 2002), and concluded that the statute (and its associated rule) was unconstitutional under the

News America standard in part because it "covers circumstances only marginally related to the purpose of increasing regulatory compliance," *id.* at 1332. The en banc majority eschews that conclusion and instead decides that because "[a]ll unlicensed LPFM broadcasters violated the Communications Act," they have "demonstrate[d] a willful disregard of the most basic rule of federal broadcasting regulation" and are properly covered by the statute and implementing rule. Maj. Op. at 247.

The differing applications of the overbreadth doctrine by the en banc majority and the panel majority suggest the importance of considering whether the doctrine properly applies at all to Ruggiero's appeal. *See L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38-41, 120 S.Ct. 483, 488-90, 145 L.Ed.2d 451 (1999). The en banc majority does not address this threshold question. Although the parties did not brief the issue of whether the overbreadth doctrine applies, the question was raised by the en banc court during oral argument and the parties' attention was drawn to the Supreme Court's decision in *Los Angeles Police Department*. Each party was afforded an opportunity to respond to the question and neither party sought permission from the court to file a supplemental memorandum on the question. As a jurisdictional issue that the court can raise *sua sponte*, insofar as the question implicates whether Ruggiero is a proper party to challenge the overbroad nature of the statute and rule, *see New York v. Ferber*, 458 U.S. 747, 767-68 & n.20, 102 S.Ct. 3348, 3349-61 & n.20 73 L.Ed.2d 1113 (1982), it behooves the court to address the threshold question of whether the doctrine applies here, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 1012-13, 140 L.Ed.2d 210 (1998).

For the reasons generally set forth in Judge Randolph's concurring opinion, I would deny the petition for review. In light of *Los Angeles Police Department*, the overbreadth doctrine does not apply. Although the dissent treats Ruggiero's challenge to the ban as based on underinclusiveness and overinclusiveness, and continues to apply the *News America* analysis, dissenting op. at 256-261, as Judge Randolph makes clear, one of Ruggiero's First Amendment challenges is an overbreadth challenge. Concurring op. Randolph, J. at 251, 252. There is no evidence that the speech of any pirate has been chilled as a result of the ban, and when counsel for Ruggiero was asked at oral argument what chilling effect the ban might have on other pirates, he was only able to identify the fact that "many of these individuals won't even bother to go through the process of applying for a broadcast license," because "[t]hey don't have a lot of money to hire lawyers." The financial inability of private parties to file suit to challenge arguably unconstitutional statutes is insufficient to show a chilling effect. Moreover, Ruggiero's own history with the Commission leaves no room for doubt that such a ban can be constitutionally applied to so flagrant a violator of the Communications Act. *See Free Speech v. Reno*, No. 98 CIV. 2680(MBM), 1999 WL 147743, at *11 (S.D.N.Y. Mar. 18, 1999), *aff'd sub nom. Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63 (2d Cir. 1999); *In re Creation of Low Power Radio Serv.*, 15 F.C.C.R. 19,208, 19,245 & n.140, 2000 WL 1434686 (2000), *amended by* 16 F.C.C.R. 8026, 2001 WL 310997 (2001). Indeed, the dissent does not suggest to the contrary, but would void the ban because it is not confined to flagrant violators. Dissenting op. at 259-260. Thus his facial challenge fails. *See* concurring op. Randolph, J. at 249.

Were the overbreadth doctrine brought to the court by a proper party, our dissenting colleague, admittedly, makes a strong case for why Congress might have done better than to ban all pirates from applying for a broadcast license. *See* dissenting op. at 259-261. However, because Ruggiero may not avail himself of that doctrine, the only remaining question for the court is whether, under something more than minimal scrutiny, Congress reasonably could have concluded that a blanket prohibition of granting low-power licenses to individuals such as Ruggiero would further the purposes underlying what is, essentially, a regulatory system largely reliant on voluntary compliance. *See In re Creation of Low Power Radio Serv.*, 15 F.C.C.R. 2205, 2226, 2000 WL 85304, *on reconsideration* 15 F.C.C.R. 19,208, 2000 WL 1434686 (2000), *amended by* 16 F.C.C.R. 8026m 2001 WL 310997 (2001); Maj. Op. at 245-246. In other words, the question is whether Congress's method is "substantially related to the Government's interest—a somewhat higher level of inquiry than mere rational relationship." *News America*, 844 F.2d at 821 (Robinson, J., dissenting). The ban, which applies without regard to the content of the pirates' speech, advances a strong governmental interest by precluding pirates, who have intentionally violated the Communications Act, from applying for a license under a regulatory scheme that depends heavily on voluntary compliance. Maj. Op. at 243-245, 245-246. Hence, Ruggiero fails to show that the ban violates the First Amendment or the Equal Protection Clause.

TATEL, *Circuit Judge*, dissenting:

No one doubts, as this court and the Commission repeatedly emphasize, that broadcasting without a license is a serious offense. Severe penalties, including fines, forfeitures, and even imprisonment, have long existed for unlicensed broadcasting. Moreover, the Commission has ample authority, which it regularly exercises, to deny licenses to former unlicensed broadcasters who, in the Commission's judgment, cannot be trusted to function as truthful and reliable licensees. The question presented here is whether unlicensed microbroadcasters, many of whom have already been punished for their misdeeds, may be subjected to a unique and draconian sanction that automatically and forever bars them—unlike any other violator of the Communications Act or regulations—from applying for low power licenses regardless of either the circumstances of their offenses or evidence that they can nevertheless operate in the public interest. Because this double standard is indefensible, because the statute's automatic lifetime ban restricts speech, and because the court, though purporting to embrace this circuit's more than minimal scrutiny standard, actually subjects the statute to the minimal scrutiny reserved for non-First Amendment cases, I respectfully dissent.

I.

The Radio Broadcasting Preservation Act's character qualification "prohibit[s] any applicant from obtaining a low power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934." Pub. L. No. 106-553, 114 Stat. 2762, § 632(a)(1)(B) (2000)

(RBPA). The court glosses over the statute's unusual harshness. No other violations of the Communications Act or broadcasting regulations result in automatic disqualification nor are punishable by this broadcasting equivalent of the death penalty. Except in the case of unlicensed microbroadcasters, the Commission "treat[s] violations of the Communications Act, Commission rules or Commission policies as having a potential bearing on character qualification." *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, ¶56, 1986 WL 292574 (1986) ("1986 Character Policy Statement") (emphasis added), *recon. granted in part and denied in part*, 1 F.C.C.R. 421, 1986 WL 292334 (1986). Even as to FCC-related misconduct involving "misrepresentation," viewed by the Commission as "rais[ing] immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission," no Commission rule subjects full power applicants to automatic, lifetime disqualification. *Id.* ¶57. In addition, the Commission allows full power applicants with unclean records to demonstrate rehabilitation. *Id.* ¶105. In this regard, the Commission considers "the passage of time since the misconduct, the frequency of misconduct, the involvement of management and the efforts to remedy the situation." *Id.* Moreover, any misconduct, communications-related or otherwise, occurring more than ten years prior to the filing of a full power application is completely disregarded. *Id.*

The RBPA treats unlicensed microbroadcasters quite differently, however. Instead of having past offenses evaluated as just one factor in assessing their qualifications, instead of having an opportunity to demonstrate rehabilitation, and instead of having their sins forgiven after ten years, they are automatically and forever barred from low

power frequencies. This capital sanction has been imposed not just on Petitioner Greg Ruggiero, but also on education- and church-related organizations that, in response to the Commission's RBPA implementing regulation, confessed to some prior acts of unlicensed broadcasting: Foundation for California State University, San Bernardino; Hume Lake Christian Camps; Calvary Chapel of Simi Valley, Inc.; Friends of the South County Library; All That Is Catholic Ministries; and Pentecostal Church of the Eternal Rock. *See Creation of a Low Power Radio Serv.*, 16 F.C.C.R. 8026, 8060-61, 2001 WL 310997 (2001) ("Second Low Power Report and Order") (amending *Creation of Low Power Radio Serv.*, 15 F.C.C.R. 2205, 2000 WL 85304 (2000) ("First Low Power Report and Order") (codified at 47 C.F.R. § 73.854)).

Not only is the RBPA's character qualification an unusually harsh broadcasting regulation, but automatic lifetime bans appear rarely in American law. True, the Fourteenth Amendment allows states to ban felons from voting, U.S. Const. Amend. XIV, § 2; *see Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), and the Commission points to a few statutes that authorize lifetime bans, see Respondent's Br. at 20-21, but none involves restrictions on speech.

II.

The court gets off to a good start: It says it rejects the Commission's position that in reviewing the RBPA's constitutionality, we should apply only minimal scrutiny. Maj. Op. at 245. I have two concerns with what follows, however. First, I think the First Amendment values at stake here are weightier than the court's opinion suggests. Sec-

ond, in sustaining the RBPA's constitutionality, the court actually applies the same minimal scrutiny standard it purports to reject.

First, the values at stake: Although no one has a First Amendment right to broadcast, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388-89, 89 S.Ct. 1794, 1805-06, 23 L.Ed.2d 371 (1969), denial of a license unquestionably burdens an applicant's opportunity for future speech. The purpose of the licensing process is to facilitate constitutionally protected speech, albeit speech somewhat less protected than that occurring outside broadcasting. *See FCC v. League of Women Voters*, 468 U.S. 364, 378, 104 S.Ct. 3106, 3116, 82 L.Ed.2d 278 (1984) ("[W]e have . . . made clear that broadcasters are engaged in a vital and independent form of communicative activity.").

As the Supreme Court made clear in Red Lion, moreover, the public has a First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broad. Co.*, 395 U.S. at 390. The Court further explained:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

Id. The public's First Amendment right to diverse broadcasting is especially important, for it is the source of the Commission's authority to limit broadcast ownership and

to apportion scarce broadcast spectrum to persons of good moral character. *See League of Women Voters*, 468 U.S. at 380, 104 S.Ct. at 3117 ("Thus, although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern."); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 794-95, 98 S.Ct. 2986, 2111-12, 56 L.Ed.2d 697 (1978) ("*NCCB*"); *Red Lion Broad. Co.*, 395 U.S. at 387-90, 89 S.Ct. at 1805-07. Indeed, when the Commission authorized the new low power service in its 2000 Report and Order, it did so expressly to increase broadcasting diversity. "We believe that the LPFM service authorized in this proceeding," the Commission explained, "will provide opportunities for new voices to be heard and will ensure that we fulfill our statutory obligation to authorize facilities in a manner that best serves the public interest." First Low Power Report and Order, 15 F.C.C.R. at 2206, ¶1.

Our decision in *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988), identifies still another reason for rejecting rational basis analysis. In that case, we confronted a statute that forbade the Commission from extending existing waivers of the cross-ownership rules. The provision affected only two such waivers, both held by a single publisher/broadcaster, Rupert Murdoch. *News America*'s challenge to the provision "l[ay] at the intersection of the First Amendment's protection of free speech and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons." *Id.* at 804. Reviewing the case law, we identified a

"spectrum" of possible broadcast restrictions, "from the purely content-based (*e.g.*, 'No one shall criticize the President') to the purely structural (*e.g.*, the cross-ownership rules themselves)," and suggested that the applicable level of constitutional scrutiny increases with the extent to which a challenged provision relies on the identity of the speaker or the content of the covered speech. *Id.* at 812. On this spectrum, the challenged prohibition on extending cross-ownership waivers was "far from purely structural . . . as it applie[d] to a closed class of one publisher broadcaster." *Id.* Concerned that "[t]he safeguards of a pluralistic political system are often absent when the legislature zeroes in on a small class of citizens," but wary of intermediate scrutiny, we concluded that "[w]hat suffices for this case is that more is required than 'minimum rationality.'" *Id.* at 813-14. Applying this heightened rational basis standard to the challenged provision, we held that the provision's narrow focus on extension of *existing* waivers of the newspaper-*television* cross-ownership rules—rather than, for example, extensions of *future* waivers or extensions of waivers of the newspaper-*radio* cross ownership rules—rendered the prohibition unconstitutionally underinclusive. *Id.* at 814-15.

Like the prohibition at issue in *News America*, the RBPA's character qualification raises not just First Amendment concerns (it restricts future lawful speech), but equal protection concerns as well because it applies to a limited class of unlicensed microbroadcasters. *Id.* at 812. Although this class is neither "closed" nor as small as *News America*'s, the class is well-defined—it consists of all unlicensed microbroadcasters and applies only to those frequencies reserved for local voices—and the character qualification focuses on the class "with the precision of a

laser beam." *Id.* at 814. Indeed, the RBPA prohibition is far more severe than the rule at issue in *News America*: Unlicensed microbroadcasters may never lawfully operate low power stations anywhere in the country, whereas Rupert Murdoch, consistent with the cross-ownership rules, could lawfully have operated television stations outside any community in which he "own[ed] or control[led] a daily newspaper." *Id.* at 802; cf. NCCB, 436 U.S. at 800, 98 S.Ct. at 2114-15.

For all these reasons, the appropriate standard of review is neither *NCCB*'s minimal scrutiny nor *League of Women Voters*' intermediate scrutiny, but rather "more than minimal scrutiny." *News Am. Publ'g, Inc.*, 844 F.2d at 813. Although purporting to agree, this court goes on to apply what is effectively minimal rationality review. It treats the RBPA as presumptively valid and disregards the many ways in which the statute is poorly tailored. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-16, 113 S.Ct. 2096, 2100-03, 124 L.Ed.2d 211 (1993) (explaining characteristics of rational basis review). It is of course true that this en banc court may overrule *News America*, but not, as it has effectively done, without providing a reasoned explanation for doing so. *See Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 866, 112 S.Ct. 2791, 2814, 120 L.Ed.2d 674 (1992) (opinion of O'Connor, Kennedy, Souter) ("The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case."). In any event, I know of no decision, either of the Supreme Court or this circuit, that applies rational basis review to a statute limiting important First Amendment rights.

Applying our more than minimal scrutiny standard, I have no doubt that ensuring truthful and reliable low power licensees and deterring future violations of the Communications Act—the reasons Congress enacted the RBPA's character qualification—represent important governmental objectives. But this does not end our analysis. We must determine "how well [the RBPA's] aim corresponds with [its] legitimate public purpose." *News Am. Publ'g, Inc.*, 844 F.2d at 814. If the statute is poorly aimed—either because its automatic, lifetime mechanism operates to exclude "conduct that seems indistinguishable in terms of the law's ostensible purpose" of increasing regulatory compliance, *id.* at 805, or because it covers conduct only remotely related to that purpose—then it limits more speech than necessary and "raise[s] a suspicion" that perhaps Congress's "true" objective was not to increase regulatory compliance, but to penalize microbroadcasters' "message." *Id.*; *see* Petitioner's Br. at 30-32 (arguing that Congress passed the RBPA to punish microbroadcasters' message). One need neither endorse the microbroadcasters' tactics, *see Grid Radio v. FCC*, 278 F.3d 1314 (D.C. Cir. 2002) (rejecting an argument that penalizing microbroadcasting piracy violates the First Amendment), nor believe the RBPA discriminates against their "message" in order to conclude that the provision's inaccurate aim—it's both under- and overinclusive—is fatal.

III.

I begin with the statute's underinclusiveness. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51-52, 114 S.Ct. 2038, 2043-44, 129 L.Ed.2d 36 (1994) (explaining that underinclusiveness in speech regulations may suggest a content or

viewpoint discriminatory motive and cast doubt on the government's asserted justification for restricting speech). If banning unlicensed microbroadcasters is vital to ensuring truthfulness and reliability, why does the RBPA exclude so much conduct that seems equally or even more related to those objectives? Specifically, the character qualification bans low power license applications only from unlicensed microbroadcasters, leaving the Commission free to evaluate applications from anyone else under its non-automatic, more permissive general character qualification policy. *See supra* at pp. 253-54. Inveterate regulatory violators, including those full power applicants who broadcast without a license, retain the opportunity to demonstrate that notwithstanding their offenses, they can reliably operate low power stations in the public interest. For example, applicants guilty of fraud or misrepresentation, long considered by the Commission to be among the most serious indicators of unreliability, are not automatically ineligible. *See* 1986 Character Policy Statement, 102 F.C.C.2d 1179, ¶57. They may apply for licenses, and the Commission will consider their misdeeds in evaluating their fitness to hold a license, or even disregard their misbehavior altogether if it occurred more than ten years ago. Of course, Congress need not address a "perceived problem"—here, the possibility of regulatory violations by other wrongdoers—"all at once," but we reject that "facile one-bite-at-a-time explanation" for otherwise inexplicable underinclusiveness in "rules affecting important First Amendment values." *News Am. Publ'g, Inc.*, 844 F.2d at 815.

The RBPA's underinclusiveness is quite pronounced, particularly when compared to the Commission's treatment of full power broadcasters. The Commission does not

automatically disqualify full power applicants who have engaged in even "the most atrocious infractions." *Weiner Broad. Co.*, 7 F.C.C.R. 832, 834, 1992 WL 689287 (1992). In *Weiner*, the Commission revoked the "incorrigible Weiner['s]" broadcast license as a result of his numerous alleged violations of Commission rules—including broadcasting without a license, evading a court injunction prohibiting his unlicensed broadcasting, and misrepresenting his true intentions in construction permit and license applications filed with the Commission—but only after considering Weiner's evidence of rehabilitation. *Id.* at 833. "Should a 'decent interval' ensue without notable delict," the Commission even offered, "Weiner is not estopped from applying again." *Id.* at 834. Likewise, in *L.D.S. Enterprises, Inc.*, 86 F.C.C.2d 283, 1981 WL 158528 (1981), a case involving "perhaps the most amoral skein of detected villainy in domestic broadcast history," *Weiner Broad. Co.*, 7 F.C.C.R. at 834, the Commission considered an applicant's evidence of rehabilitation even though he had deliberately distorted newscasts to favor certain senatorial candidates, made illegal campaign contributions, bribed public officials, and attempted to eavesdrop on and intimidate Commission witnesses. *L.D.S. Enter., Inc.*, 86 F.C.C.2d at 286. Finally, in *Modesto Broadcast Group*, 7 F.C.C.R. 3404, 1992 WL 689902 (1992), the Commission reviewed a license application filed by a station whose general manager had operated during the day with relatively high, nighttime power, thus risking interference with other stations. Although the Commission ultimately rejected the application, it did so only after considering the willfulness, duration, and timing of the violations—factors that the RBPA prohibits the Commission from considering

in cases involving unlicensed microbroadcasters who seek LPFM licenses. *Id.* at 3422-23.

This court offers three unconvincing explanations for the statute's underinclusiveness. First, it says that "other violations of law simply do not reflect as directly upon the offender's qualification to hold an LPFM license." Maj. Op. at 246. Assuming that to be true, why does the RBPA's automatic and permanent ban not extend to unlicensed full power broadcasters, such as the "incorrigible Weiner"? In any event, I think it not at all obvious that unlicensed microbroadcasters who broadcast briefly and years ago and who shut down promptly when told to do so present any greater risk of unreliable behavior than applicants who recently obtained their licenses through fraud or misrepresentation or who perpetrated the "most amoral skein of detected villainy in domestic broadcast history." If anything, the Weiners of the world should be of greater concern. Nor do I think it inherently obvious that former unlicensed microbroadcasters necessarily present a higher risk of frequency interference than do Weiner or the Modesto general manager. Whether caused by unlicensed microbroadcasters or by licensed broadcasters operating on someone else's frequency, frequency interference is frequency interference. Indeed, unauthorized full power broadcasters, whose range and power far exceed that of microbroadcasters, would seem to present a greater risk of interference. Of course, such observations would be irrelevant were we applying rational basis review, *see Beach Communications*, 508 U.S. at 313-16, 113 S.Ct. at 2100-08, but our more than minimal scrutiny standard requires us to determine whether Congress's means are appropriately tailored to achieve its goals.

The court's second explanation for the RBPA's single-minded focus on unlicensed microbroadcasters is this: "There is a reasonable fit between the character qualification and the Government's substantial interests in deterring unlicensed broadcasting and preventing further violations of the regulations applicable to broadcasters." Maj. Op. at 247. I agree that deterrence is a substantial governmental interest, but why impose a lifetime ban? Even given the many violations that occurred during the movement to end the low power ban, what is it about unlicensed microbroadcasters, alone among applicants who have committed offenses, that requires a broadcasting "mark of Cain" to deter future offenses? *Genesis* 4:15.

The weakness of the deterrence rationale is particularly evident in view of the fact that the Commission's 2000 Report and Order, which the RBPA replaced, made crystal clear that applicants who continue broadcasting without licenses after the 1999 Notice of Proposed Rule Making would be automatically and forever ineligible for any broadcast license. "[T]he illegality of unauthorized broadcasting," the Commission explained, "must now be presumed to be well-known, and any unlicensed broadcast operation occurring more than 10 days after the *Notice* was issued will make the applicant ineligible for low power, full power, or any other kind of license and will be subject to fines, seizure of their equipment, and criminal penalties." First Low Power Report and Order, 15 F.C.C.R. at 2227, ¶55. Neither the court nor the Commission explains why banning all former unlicensed broadcasters would further deter unlicensed broadcasting, and for good reason: If the threat of automatic and lifetime disqualification is insufficient to deter someone from broadcasting, that person is unlikely to experience a sudden change of heart sim-

ply because Congress retroactively extended an identical ban to microbroadcasters who operated illegally prior to the NPRM. And even if, as Commission counsel suggested at oral argument, the RBPA's deterrent effect would be greater because the Commission had authority to waive its more limited bar, Tr. of Oral Arg. at 28:8-32:23, Congress could have corrected that defect simply by making the Commission's rule nonwaivable.

The court's final response to the RBPA's underinclusiveness is that "[t]he judgment that one offense is more serious than another, like the judgment that a punishment of a certain severity is warranted for a particular offense, is not for the judiciary to make." Maj. Op. at 247 n.*. In support of this proposition, the court cites two cases holding that juvenile curfews, both of which included numerous exemptions to protect First Amendment rights, were not unconstitutionally underinclusive because they applied only to juveniles sixteen and under, but not to seventeen-year-olds. *Id.* (citing *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999) (en banc); *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998)). The records in both cases, however, contained evidence of disproportionate criminal activity by juveniles sixteen and under, thus providing an empirical justification for the curfews' differential treatment of seventeen-year-olds. *See Hutchins*, 188 F.3d at 543 ("[T]he District brought to our attention more data showing that arrests for youths under 17 have been increasing steadily."); *Schleifer*, 159 F.3d at 849-50 ("[T]he City's evidence documents a serious problem of crime among younger juveniles."). In *Hutchins*, moreover, this court recognized a logical justification for excluding seventeen-year-olds from the curfew—their inclusion increased the curfew's intrusiveness as well as

its enforcement burden. *Hutchins*, 188 F.3d at 543. Far from holding that we should ignore underinclusiveness in regulations that affect important First Amendment rights, the two curfew cases stand for the unexceptional proposition that legislation is not underinclusive if its differential treatment has empirical or logical justification. Absent any such justification for the RBPA's differential treatment of microbroadcasters, this court's disregard of the statute's underinclusiveness is more characteristic of the rationality review the court says it rejects than of the heightened scrutiny it purports to apply.

IV.

The RBPA's character qualification is poorly aimed for a second reason: Although the RBPA certainly eliminates any risk that unlicensed microbroadcasters will become unreliable or untruthful licensees—after all, they can never become licensees—the statute, because of its automaticity, covers circumstances only marginally if at all related to the purpose of increasing regulatory compliance. *See Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (invalidating statute as overinclusive); *League of Women Voters*, 468 U.S. at 396-99, 104 S.Ct. at 3125-27 (same). For example, the character qualification bans applications from former unlicensed operators who violated the licensing requirement only briefly or long ago; from operators who shut down immediately upon receiving a Commission order to do so; from operators who have since exhibited, in whatever manner, an ability to abide by federal laws and regulations; from operators who (like Ruggiero, *see* Wangaza Decl.) seek only to serve as members of a multi-member board, rather

than as president or CEO of an applicant station; and, most tellingly, from operators who were unaware of the licensing requirement at the time of their violation. I do not understand how a restriction that ignores such factors can accurately target those former unlicensed microbroadcasters who do pose real risks of future malfeasance.

According to this court, "[a]ny unlicensed broadcasting demonstrates a willful disregard of the most basic rule of federal broadcasting regulation." Maj. Op. at 247. Of course that's not true of operators who were unaware of the licensing requirement and ceased broadcasting immediately upon being told to do so. In any event, why impose a lifetime ban even for willful violators? Statutory and regulatory violations by full power broadcasters are considered as just one element in the licensing process and completely forgiven under certain circumstances. What is it about these little unlicensed microbroadcasters, some of whom are education and church organizations, *see supra* p. 243-44, that leads this court to exclude any possibility of rehabilitation? I see no rational basis for assuming that all unlicensed microbroadcasters, regardless of either who they are or the circumstances of their violations, can never again be trusted to hold low power licenses.

Contrary to the court's opinion, moreover, neither the Commission Order on Reconsideration nor the House Report supports the proposition that *all* unlicensed microbroadcasters should be automatically and forever banned. In fact, the Commission *rejected* a total ban, applying automatic disqualification to only those unlicensed microbroadcasters who refused to stop either after being told to do so or within ten days of the 1999 NPRM. *See Creation of Low Power Radio Serv.*, 15 F.C.C.R. 19,208, ¶96, 2000 WL 1434686 (2000) (Opinion and Order on Reconsidera-

tion). And nothing in the House Report's one-sentence discussion of the RBPA's character qualification explains why all former unlicensed microbroadcasters, regardless of the circumstances of their violations or evidence of rehabilitation, must be automatically barred in order to ensure licensee truthfulness and reliability. H.R. Rep. No. 106-567, at 8 (2000).

The RBPA's overinclusiveness is serious. Because the statute covers so much behavior unrelated to regulatory compliance, it limits more speech than necessary to accomplish Congress's objectives. Moreover, contrary to *Red Lion*, by unnecessarily denying licenses to potential speakers, the RBPA may be limiting broadcast diversity and doing so in the very portion of the spectrum set aside for new voices. *See Ashcroft v. ACLU*, 535 U.S. 564, 122 S.Ct. 1700, 1718, 152 L.Ed.2d 771 (2002) (Kennedy, J., concurring) ("Indeed, when Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes, for 'differences in the characteristics of new media justify . . . differences in the First Amendment standards applied to them.'" (quoting *Red Lion Broad. Co.*, 395 U.S. at 386, 89 S.Ct. at 1804-05)).

Though arising in a different context, the Supreme Court's recent decision in *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002), highlights the RBPA's fatal overinclusiveness. *Thomas* involved a challenge to an ordinance that permitted (but did not require) denial of an application to parade in a public park when an applicant had, among other things, "violated the terms of a prior permit." *Id.* at 324, 122 S.Ct. at 780-81. Holding that the First Amendment

does not preclude discretionary license denials, the Supreme Court explained:

> The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech . . . by organizations that fail to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid.

Id. at 325, 122 S.Ct. at 781. The issue in Thomas is quite similar to the one we face here, even though the broadcast spectrum, unlike a public park, is not a public forum. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676, 118 S.Ct. 1633, 1640-41, 140 L.Ed.2d 875 (1998) (holding that public forum doctrine did not apply to public television broadcast). Both cases involve forums unable to accommodate all speakers, and in both cases the government seeks to avoid chaos and to ensure the forums' availability for use by as many speakers as possible. In *Thomas*, the Court discussed the constitutionality of a "rigid, no-waiver" rule that would automatically deny permits to persons who had violated park district rules; here, Congress adopted a "rigid, no-waiver" rule that automatically denies low power licenses to all former unlicensed microbroadcasters. To use *Thomas*'s words, then, the "prophylaxis achieved by" the RBPA's character standard is "far outweighed . . . by the accompanying senseless prohibition of speech" by applicants who once broadcast illegally "but for one reason or another pose no risk of the evils that those requirements are designed to avoid."

The concurring opinion, relying on *Los Angeles Police Department v. United Reporting, Inc.*, 528 U.S. 32, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999), argues that Ruggiero "cannot invoke the [First Amendment] overbreadth doctrine." Randolph Op. at 249. I disagree for two reasons. First, unlike United Reporting, the respondent in *Los Angeles Police Department*, Ruggiero is not "'a person to whom [the RBPA] may constitutionally be applied'" who is "'challeng[ing] that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" *L.A. Police Dep't*, 528 U.S. at 38, 120 S.Ct. at 488 (quoting *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 3359-60, 73 L.Ed.2d 1118 (1982)). Ruggiero has never conceded that the RBPA may be applied constitutionally to him, much less to anyone else. Quite to the contrary, he argues that the RBPA cannot constitutionally be applied to anyone because the statute automatically bars unlicensed microbroadcasters (unlike all other Communications Act violators) from future speech without an opportunity to demonstrate to the Commission that notwithstanding their offenses, they can function as truthful and reliable licensees.

It is true that Ruggiero concedes that "some former pirates may lack the requisite character traits to hold [low power] licenses," Petitioner's Reply Br. at 11, and that he never says that his behavior is "not egregious," Randolph Op. at 250. But that's beside the point. Ruggiero argues not that he has a *right* to serve on the low power station's board of directors, but that this poorly tailored statute automatically bars him from even trying to demonstrate to the Commission—which under its general character policy automatically disqualifies not even the most "atrocious" violators—that he can nevertheless be trusted to function

in the public interest. Ruggiero thus has no need to take advantage of the overbreadth doctrine's " 'departure from traditional rules of standing,' " designed "to enable persons who are themselves unharmed by the defect in a statute nevertheless 'to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.' " *Bd. of Trustees v. Fox*, 492 U.S. 469, 484, 109 S.Ct. 3028, 3037, 106 L.Ed.2d 388 (1989) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 29ö8, 1916-17, 37 L.Ed.2d 830 (1973) (emphasis added)).

Second, even if the RBPA could constitutionally be applied to Ruggiero, I believe he would prevail on an overbreadth challenge. To begin with, and contrary to the concurring opinions, the RBPA does present a classic chilling effect. Because the Commission's RBPA regulations require low power license applicants to disclose all prior unlicensed broadcasting, those applicants whose piracy went undetected—a situation the Commission considers to be covered by the RBPA, *see* Second Low Power Report and Order, 16 F.C.C.R. at 8030, ¶ 11—must either (1) admit to a prior act of unlicensed broadcasting, an admission leading not just to permanent ineligibility, but also to possible administrative and/or criminal sanctions, or (2) deny their prior misconduct, risking both prosecution for perjury and "additional enforcement actions," *id.* It is thus not accurate to say that "[i]f [unlicensed broadcasters] file applications in the future no harm will befall them. Their applications will simply be denied." Randolph Op. at 249. Rather than face the Scylla of administrative and criminal prosecution for unlawful broadcasting or the Charybdis of perjury and Commission enforcement actions for failing to disclose such broadcasting, former unlicensed microbroad-

casters may find it far safer to forego applying for licenses and simply remain silent. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (allowing overbreadth challenge based on potential cutoff of government funding).

It is true that under the Commission's general character policy, applicants must disclose any unlicensed broadcasting. *See* Randolph Op. at 250. But the question here is whether the *RBPA*, not the Commission's general character policy, has a chilling effect. I am unaware of any decision rejecting an overbreadth challenge because the "preceding regime" not actually at issue may have had an equally chilling effect as the challenged provision. *Id.* And for the same reason the RBPA is unconstitutionally overinclusive, Ruggiero could prevail on an overbreadth challenge. *See Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2571-72, 96 L.Ed.2d 500 (1987) (finding statute banning all First Amendment activities at airport "substantially overbroad" and unconstitutional under overbreadth doctrine).

V.

Declaring the RBPA unconstitutional would not leave Congress powerless to bar unlicensed microbroadcasters from receiving low power licenses. This circuit's more than minimal scrutiny standard leaves ample room for carefully aimed licensing restrictions. Moreover, the Commission already has authority under its long-existing character qualification policy to deny licenses to unlicensed microbroadcasters who, in the Commission's considered judgment, have demonstrated an inability "'to deal truthfully with the Commission and to comply with [its] rules

and policies.'" First Low Power Report and Order, 15 F.C.C.R. at 2226, ¶54 (internal citation omitted). In view of this circuit's heightened rational basis standard, however, the court has no basis for sanctioning an automatic, lifetime ban on future lawful speech that applies, indefensibly, to only a limited class of unlicensed microbroadcasters and to just the portion of the spectrum created for new voices.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1100
September Term, 2001
Filed: May 2, 2002

GREG RUGGIERO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

Before: GINSBURG, *Chief Judge*;
EDWARDS, SENTELLE, HENDERSON, RANDOLPH,
ROGERS, TATEL, and GARLAND, *Circuit Judges*

ORDER

Upon consideration of the respondents' petition for rehearing en banc, the response thereto, and the vote by a majority of the judges of the court in regular, active service in favor of the petition, it is

ORDERED that the petition be granted. This case will be heard by the court sitting en banc. The judgment filed on February 8, 2002 is hereby vacated. It is

FURTHER ORDERED that an order governing further proceedings will issue separately.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ NANCY G. DUNN
Nancy G. Dunn
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1100

Argued September 6, 2001

Decided February 8, 2002

GREG RUGGIERO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

ROBERT T. PERRY argued the cause and filed the briefs for petitioner. With him on the brief was BARBARA J. OLSHANSKY.

JACOB M. LEWIS, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were ROBERT S. GREENSPAN, Attorney, JANE E. MAGO, Acting General Counsel, Federal Communications Com-

mission, DANIEL M. ARMSTRONG, Associate General Counsel, JOHN F. INGLE, Deputy Associate General Counsel, C. GREY PASH, JR. and LISA F. BOEHLEY Counsel.

Before: HENDERSON, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

TATEL, *Circuit Judge:*

In this case, an unlicensed microbroadcaster—a "pirate"—challenges the constitutionality of the Radio Broadcasting Preservation Act of 2000's character qualification provision, which permanently prohibits anyone who ever "engaged in any manner in the unlicensed operation of any station in violation of . . . the Communications Act of 1934" from obtaining a low-power FM radio license. To survive First and Fifth Amendment challenges in this Circuit, restrictions limiting the future lawful speech of a well-defined class of broadcasters must be more than "minim[ally] rational[ ]." *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 812, 814 (D.C. Cir. 1988) ("*News America*"). Finding nothing in the Act, its legislative history, or the record before us to justify the character qualification provision's unique and draconian sanction for broadcast piracy, nor to explain why a more limited restriction would not achieve Congress's objective, we hold that the provision and its implementing regulation fail to meet this standard and are therefore unconstitutional.

I.

Section 301 of the Communications Act of 1934 makes it unlawful to operate a radio station without a license

issued by the Federal Communications Commission. 47 U.S.C. § 301. When the Commission began licensing FM radio stations in the 1940s, it licensed both high-power stations and low-power, or "Class D," educational stations operating with a maximum of ten watts of power. In 1978, however, the Commission concluded that the Class D stations were impeding expansion of more efficient high-power operations. Opting to "str[ike] the balance in favor of licensing higher powered stations to ensure that large audiences were served," the Commission stopped licensing low-power stations and required most existing stations to upgrade to at least 100 watts. Creation of Low Power Radio Serv., 15 F.C.C. Rcd. 19,208, 19,236 (2000) ("First Low-Power Reconsideration") (recons.) (discussing the 1978 rule, Changes in the Rules Relating to Noncommercial Educ. FM Broad. Stations, 70 F.C.C.2d 972, 983 (1979) (codified at 47 C.F.R. § 73.512(d))).

Over the next two decades, often in open defiance of this rule, individual pirates began operating unlicensed low-power stations that broadcast local news, music, and commentary. Known as "microradio," this phenomenon expanded significantly in the late 1990s after Congress amended the Telecommunications Act to eliminate restrictions on the number of radio stations any one person or entity could own. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(a), (b), 110 Stat. 56, 110-12 (1996). Following the amendment, ownership of licensed radio stations became increasingly concentrated, leading—according to microradio proponents—to a "marked decline in serious local radio news reporting" and a corresponding increase in the perceived importance and, in turn, number of unlicensed low-power stations. Pet'r's Br. at 6-7. In response to this microradio expansion, the Commission

cracked down on pirates, ordering them to cease broadcasting and taking legal action against those who refused. *See, e.g., Grid Radio v. FCC*, 278 F.3d 1314 (D.C. Cir. Feb. 8, 2002); *United States v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000).

In 1999, the Commission again changed course, seeking public comment on proposed rules that would allow licensing of low-power stations. The Commission observed that in contrast to 1978, when it first adopted the microbroadcasting ban, "[n]ow, . . . radio service is widely available throughout the country and very little spectrum remains available for new full-powered stations," so licensing low-power stations could "fill . . . gaps in the spectrum that would otherwise go unused," First Low-Power Reconsideration, 15 F.C.C. Rcd. at 19,236, providing a "low-cost means of serving" both urban and rural areas, Creation of Low Power Radio Serv., 14 F.C.C. Rcd. 2471, 2471 (1999) ("Low-Power Proposal") (notice of proposed rulemaking). Many groups submitted comments, with students, religious groups, and labor unions generally supporting the low-power program, and the established broadcasting industry (including National Public Radio and other noncommercial broadcasters) opposing it.

In January 2000, the Commission issued an order authorizing two new classes of low-power stations: 100-watt stations, reaching a radius of roughly 3.5 miles, and 10-watt stations, reaching a radius of less than 2 miles. Creation of Low Power Radio Serv., 15 F.C.C. Rcd. 2205, 2205, 2210-12 (2000) ("First Low-Power Rulemaking"). The order encouraged local ownership of low-power stations, limited the number of such stations any single entity could own, required the stations to operate on a noncommercial, educational basis, and prohibited existing media

entities from holding interests in them. *Id.* at 2215-25. The order also included a provision addressing license applications by broadcast pirates. Concerned that those who had flouted the licensing process in the past could not be trusted "to deal truthfully with the Commission and to comply with [its] rules and policies," the Commission provided that it would only accept low-power applications from individuals who certified (under penalty of perjury) that if they had operated illegally in the past, they ceased all such operations either within twenty-four hours of being directed by the Commission to do so or within ten days of publication of the Low-Power Proposal. *Id.* at 2225-26. The Commission also extended this requirement to all parties to any corporate applicant, including the applicant's "parents, its subsidiaries, their officers and members of their governing boards." *Id.* at 2223-26.

This version of the low-power rules was short-lived. Less than a year after the rules' promulgation, Congress, responding to broadcast industry lobbying, *see*, *e.g.*, 146 Cong. Rec. S8197-8211 (statement of Sen. Grams) (discussing licensed broadcasters' concerns about the low-power rules), passed the Radio Broadcasting Preservation Act of 2000 ("RBPA"), Pub. L. No. 106-553, 114 Stat. 2762 (2000). The RBPA directs the Commission to amend the low-power rules to limit the frequencies available for low-power stations, thus reducing the risk of interference to existing stations. Central to this case, the Act also directs the Commission to deny licenses to all applicants whose officers or board members ever "engaged in any manner in the unlicensed operation of any station in violation" of the Communications Act. *Id.* § 632(a)(1)(B). This "character qualification provision" thus eliminates the distinction the Commission had drawn between those erst-

while broadcast pirates who voluntarily ceased broadcasting within a specified period and those who refused. The provision also rescinds the Commission's discretion to waive the character qualification requirement in cases in which, despite an applicant's—or a party to an applicant's—unlicensed broadcasting, the Commission finds no reason to question the applicant's potential reliability as a licensee. *Id.* § 632(a)(2)(B).

Following passage of the RBPA, the Commission issued rules implementing the Act's character qualification provision. Creation of Low Power Radio Serv., 16 F.C.C. Rcd. 8026, 2001 FCC LEXIS 1760 (2001) ("Second Low-Power Rulemaking") (amending First Low-Power Rulemaking). Under the new rules—described by the Commission as "minor amendment[s]" that merely "codif[y] a Congressional requirement"—all pirates and former pirates are automatically and permanently disqualified from applying for low-power licenses. *Id.*, 2001 FCC LEXIS 1760, at *15. Moreover, an applicant is deemed "ineligible to hold [a low-power] license if it has engaged in unlicensed operation *regardless of whether the Commission has made a specific finding that the party has engaged in such conduct.*" *Id.*, 2001 FCC LEXIS 1760, at *14 (emphasis added).

II.

Petitioner Greg Ruggiero, an acknowledged former pirate affiliated with microbroadcasting stations in New York City and elsewhere, argues that facially and as applied to him, the character qualification provision and implementing regulation violate the First and Fifth Amendments to the United States Constitution. Before considering the merits of Ruggiero's challenge, we must

deal with the Commission's argument that we lack jurisdiction for two independent reasons: because Ruggiero failed to file a petition for review, and because he lacks Article III standing. We consider each in turn.

Petition for Review

Resolving the Commission's first argument requires an understanding of the history of this case. Ruggiero originally filed a petition for review of the Commission's First Low-Power Rulemaking, in which he argued that the then-current version of the licensing restriction violated both the Administrative Procedure Act and the First Amendment. Following passage of the RBPA, we remanded the record to the Commission and directed the parties to file supplemental briefs addressing Ruggiero's standing to pursue his First Amendment claim, as well as the merits of that claim as applied "to the Act and any implementing orders or regulations the Commission may issue." Order of the United States Court of Appeals for the District of Columbia Circuit at 1 (Jan. 8, 2001) (No. 00-1054) ("Order of Jan. 8, 2001"). After the Commission issued the Second Low-Power Rulemaking, the parties submitted the requested supplemental briefs, and we heard oral argument on Ruggiero's constitutional claims—expanded by a footnote in Ruggiero's Supplemental Brief to include a claim under the Fifth Amendment—as applied to the RBPA and the new rules.

The Commission now argues that because Ruggiero never filed a petition for review of the Second Low-Power Rulemaking, this court lacks jurisdiction to hear his constitutional challenge. We disagree. Although it is true that Ruggiero did not file a second petition for review, he did,

as we directed, file a brief addressing the constitutionality of the RBPA and the Commission's implementing regulation, and that brief, in all but title, satisfies the four statutory requirements for a petition for review of the Second Low-Power Rulemaking. Specifically, as required by 28 U.S.C. § 2344, Ruggiero filed the brief within sixty days of the rulemaking; stated "the nature of the proceedings as to which review is sought, . . . the facts on which venue is based, . . . the grounds on which relief is sought, and . . . the relief prayed"; attached a copy of the challenged rulemaking; and served the brief on the Commission and the United States Department of Justice. *See generally* Pet'r's Supp. Br. at 1-10, App. B, Certificate of Service. Accordingly, we may treat the brief as the "functional equivalent" of a petition for review. *See Smith v. Barry*, 502 U.S. 244, 248-49, 112 S.Ct. 678, 682, 116 L.Ed.2d 678 (1992) (internal citations omitted) (construing pro se brief as notice of appeal and noting that "[i]f a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal"); *Moore v. United States Dep't of Transp.*, 3 Fed. Appx. 508, 512 (7th Cir. 2001) (unpublished disp.) (citing *Smith v. Barry* and construing brief as "functional equivalent of a timely petition for review" of agency action).

This liberal construction of 28 U.S.C. § 2344 makes particular sense in this case. For one thing, as we learned at oral argument, Ruggiero filed no second petition for review solely because we had directed him to file a supplemental brief addressing the applicability of his First Amendment claims to the RBPA and any subsequent implementing regulations. *See* Order of Jan. 8, 2001, at 1; *cf. Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 163 (D.C. Cir. 1996) (discussing "the unique circumstances

doctrine, under which appellate courts will excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order or ruling which purportedly extended or tolled the appeal deadline" (citing, inter alia, *Thompson v. INS*, 375 U.S. 384, 387, 84 S.Ct. 397, 398-99, 11 L.Ed.2d 104 (1964) (applying the doctrine))). Moreover, we maintained jurisdiction of Ruggiero's claims throughout the Commission's implementation of the RBPA, remanding only the record for further Commission action. Order of Jan. 8, 2001, at 1; see also D.C. Cir. R. 41(b). Finally, Ruggiero's original contentions, made in his brief challenging the First Low-Power Rulemaking, are sufficiently broad to cover at least his First Amendment challenge to the character qualification provision and implementing regulation. His original brief asserted that the Commission "violated [his] First Amendment rights in disqualifying [him] from holding a low power FM radio station license" and that "[t]he [a]utomatic [d]isqualification [p]olicy [l]acks the [n]arrow [t]ailoring [r]equired by the First Amendment." Pet'r's Br. at 2, 23. These broadly worded objections to the First Low-Power Rulemaking are equally valid as objections to the amended rules, as Ruggiero continues to argue primarily that the Commission violated his First Amendment rights by automatically disqualifying him and other unlicensed microbroadcasters from holding low-power licenses. *Cf. Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109 (D.C. Cir. 1989) (finding jurisdiction to review claims despite appellant's failure to file new FERC petition for rehearing because most of appellant's objections to agency's first decision, raised in timely petition for review, were "equally valid" as objections to agency's amended decision).

Standing

In support of its argument that Ruggiero lacks Article III standing, the Commission relies on two basic facts: First, although Ruggiero once operated an unlicensed microradio station, he is not now an applicant for a low-power license, nor is he associated with any such applicant; and second, Ruggiero is a resident of New York City where, all concede, no spectrum space is available for low-power stations. In response, Ruggiero claims that but for the RBPA's character qualification provision, he would associate with a low-power applicant. To support this assertion, he submitted a declaration by the President of a Greenville, South Carolina station stating that the station has applied for a low-power license and that "[b]ut for the character qualification provisions[,] . . .[it] would offer [Ruggiero] a position on [its] board of directors." Wangaza Decl. para. 3. Because the Commission challenges none of the declaration's factual assertions, we think Ruggiero has established the prerequisites for Article III standing: a personal injury (inability to become a director of the Greenville station), fairly traceable to the challenged action (the character qualification provision and implementing regulation), and likely to be redressed by the requested relief (a declaration that the provision and regulation are unconstitutional). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992).

We are equally unpersuaded by the Commission's secondary standing argument: that Ruggiero is a "poor candidate" to challenge the character qualification provision because, given his history of deliberate and willful licensing violations, the Commission would be unlikely to grant him a license even in the absence of the provision. This

may be true, but it is irrelevant. Ruggiero alleges only that the RBPA's per se ban deprives him of the right to compete in the low-power licensing process, and the Supreme Court has held that such allegations are sufficient for Article III standing. *See Northeastern Fla. Chapter of the Assocd. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.").

III.

To evaluate the constitutionality of the RBPA's character qualification provision—and, in turn, the implementing regulation—we must first identify the appropriate level of First and Fifth Amendment scrutiny. The parties agree, as they must in view of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), that the "scarcity of broadcast frequencies" necessitates that "broadcast regulations receive more lenient [First Amendment] scrutiny than ones affecting other types of speech." *News Am.*, 844 F.2d at 811. Going further, the Commission asserts that under *FCC v. National Citizens Committee for Broadcasting*, we should ask only whether the challenged character qualification provision "is based on consideration of permissible factors and is otherwise reasonable." 436 U.S. 775, 793 (1978) ("*NCCB*"). We disagree.

To begin with, neither *NCCB* nor any subsequent Supreme Court case supports the Commission's position

that all "reasonable" broadcasting restrictions automatically pass constitutional muster. *NCCB* involved both statutory and constitutional challenges to Commission regulations governing cross-ownership of broadcast stations and daily newspapers in the same community ("the cross-ownership rules"). Although the *NCCB* Court did indeed observe that the Commission has broad regulatory authority to "issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable," it made that statement when describing the Commission's mandate under the Communications Act. 436 U.S. at 793, 98 S.Ct. at 2111. Turning to the petitioner's First Amendment arguments, the Court indicated only that regulation of broadcast frequencies is permissible if the regulation is content-neutral and preserves "the interests of the 'people as a whole . . . in free speech.'" *Id.* at 800 (quoting *Red Lion Broad. Co.*, 395 U.S. at 390, 89 S.Ct. at 1806). Concluding that the challenged cross-ownership regulations meet both requirements, the Court found the regulations "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802, 98 S.Ct. at 2115. The Court expressly distinguished broadcast regulations that turn "on the content of constitutionally protected speech," however, and said nothing about restrictions—like those at issue here—that permanently limit the speech of certain specific individuals. *Id.* at 801, 98 S.Ct. at 2115.

Supreme Court case law since *NCCB*, moreover, confirms that some broadcast regulations merit heightened scrutiny. In *FCC v. League of Women Voters*, for example, the Court used intermediate scrutiny to strike down a statute that banned noncommercial educational stations

from "engag[ing] in editorializing." 468 U.S. 364, 366, 104 S.Ct. 3106, 3110, 82 L.Ed.2d 278 (1984). The Court observed that although "the broadcasting industry . . . operates underrestraints not imposed upon other media," restrictions that constrain broadcasters' choices about the viewpoints presented fail constitutional scrutiny unless "narrowly tailored to further a substantial governmental interest." *Id.* at 380, 104 S.Ct. at 3118.

Finally, in *News America*, we expressly rejected rational basis review as the standard for evaluating the constitutionality of a broadcasting restriction analogous to the one challenged here. *See* 844 F.2d at 810-14. In that case, we confronted a statute that forbade the Commission from extending existing waivers of the cross-ownership rules. The provision affected only two such waivers, both held by a single publisher/broadcaster, Rupert Murdoch. News America's challenges to the provision "l[ay] at the intersection of the First Amendment's protection of free speech and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons." *Id.* at 804. Reviewing the case law, we identified a "spectrum" of possible broadcast restrictions, "from the purely content-based (*e.g.*, 'No one shall criticize the President') to the purely structural (*e.g.*, the cross-ownership rules themselves)," and suggested that the applicable level of constitutional scrutiny increases with the extent to which a challenged provision relies on the identity of the speaker or the content of the covered speech. *Id.* at 812. On this spectrum, we continued, the "prohibition at issue in *League of Women Voters* [was] at some remove from pure content, as it forbade 'editorializing' of any kind by the covered stations[,]" while the challenged prohibition on extending cross-ownership waivers was "far from purely

structural . . . as it applie[d] to a closed class of one publisher broadcaster." *Id.* Concerned that "the safeguards of a pluralistic political system are often absent when the legislature zeroes in on a small class of citizens[,]" but wary of League of Women Voters' intermediate-scrutiny standard, we concluded, "[w]hat suffices for this case is that more is required than 'minimum rationality.'" *Id.* at 814. Applying this heightened rational basis standard to the challenged provision, we concluded that the provision's narrow focus on extensions of existing waivers of the newspaper-television cross-ownership rules—rather than, for example, extensions of future waivers, or extensions of waivers of the newspaper-radio cross-ownership rules—rendered the prohibition unconstitutionally underinclusive. *See id.* at 814-15.

Like the prohibition at issue in *News America*, the RBPA's character qualification provision raises both First Amendment and Equal Protection concerns, as it restricts future lawful speech (licensed broadcasting) and applies to a limited class of pirates and former pirates. *See* 844 F.2d at 812. True, as the dissent points out, Dissent at 1334 n.1, the class of pirate microbroadcasters is neither "closed" nor as small as *News America*'s single-member class, but the former class is well defined (consisting of all pirates), and the character qualification provision focuses on it "with the precision of a laser beam." *News Am.*, 844 F.2d at 814. The character qualification provision, moreover, is far more severe than the *News America* prohibition: An unlicensed broadcaster can never lawfully operate a low-power station anywhere in the country, whereas even under the *News America* prohibition, Rupert Murdoch could lawfully have operated a television station outside of any community in which he "own[ed] or control[led] a daily

newspaper." *Id.* at 803; *cf. NCCB*, 436 U.S. at 800, 98 S.Ct. at 2115 (holding that the cross-ownership rules do not "condition receipt of a broadcast license upon forfeiture of the right to publish a newspaper" because even "[u]nder the regulations, . . . a newspaper owner need not forfeit anything in order to acquire a license for a station located in another community"). On the other hand, like the *News America* prohibition, the character qualification provision is not purely content-based, nor does it ban "a form of speech . . . that lies at the heart of First Amendment protection," as did the prohibition on editorializing at issue in *League of Women Voters*. 468 U.S. at 381, 104 S.Ct. at 3118. As in *News America*, therefore, we find ourselves in a middle ground, sure only that the appropriate standard is neither *NCCB*'s minimal scrutiny nor *League of Women Voters*' intermediate scrutiny. Also as in *News America*, however, we need not "exact[ly] characteriz[e] . . . the proper standard," for "any that is appreciably more stringent than 'minimum rationality' requires invalidation of the challenged [provision]." 844 F.2d at 802.

IV.

The RBPA's meager legislative history suggests that in enacting the statute's character qualification provision, Congress sought to increase compliance with Commission regulations in two ways: by deterring future operation of unlicensed stations and by preventing former pirates—who Congress evidently believes would violate other Commission rules if given the opportunity—from obtaining licenses. *See* H.R. Rep. No. 106-567, at 8 (2000) ("[O]peration of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which

are essential to having a broadcast service that serves the public."); 146 Cong. Rec. S613-S626 (2000) (statement of Senator Gregg) (arguing that permitting pirates to obtain low-power licenses would "reinforce their unlawful behavior and encourage[ ] future illegal activity by opening the door to new unauthorized broadcasters"); *see also* Resp'ts' Br. at 7-8 ("[T]he statute . . . is reasonably designed to avoid licensing those whose past conduct portends future unlawful behavior."). Accepting the legitimacy of this broad goal, we nevertheless believe that the character qualification provision suffers from the same defect that doomed the statute challenged in *News America*: The provision "bears only the most strained relationship to [its ostensible] purpose." 844 F.2d at 814.

To begin with, the provision is "astonishingly underinclusive," *id.* at 814, excluding some "conduct that seems indistinguishable in terms of [the] ostensible purpose" of increasing regulatory compliance, *id.* at 805. Specifically, the provision bans low-power license applications only from broadcasters who have operated without a license, leaving the Commission free to evaluate applications from anyone else under its preexisting, more permissive character qualification policy. *See* Policy Regarding Character Qualifications in Broad. Licensing, 102 F.C.C.2d 1179, 1229 (1986), *recon. granted in part and denied in part*, 1 F.C.C. Rcd. 421 (1986). As a result, civil wrongdoers, felons, and even inveterate regulatory violators other than pirates, retain the opportunity to demonstrate that notwithstanding their offenses, they can reliably operate microbroadcast stations in the public interest. In Modesto Broadcast Group, for example, the Commission considered a license application filed by a station whose general manager had operated with relatively high, night-time-

authorized power during the day, risking interference with other stations. 7 F.C.C. Rcd. 3404, 3422 (1992). The Commission ultimately rejected the application, but only after considering such factors as the willfulness, duration, and timing of the general manager's violations—factors that the RBPA prohibits the Commission from considering in cases involving pirates who seek microbroadcast licenses. *See id.*; *see also Alessandro Broad. Co.*, 99 F.C.C.2d 1, 11 n.13 (1984) (refusing to disqualify applicant for new broadcast station permit even though applicant's controlling shareholder had been convicted of second degree murder because "the crime was an isolated event that occurred in the remote past and the state authorities . . . [had] determined officially that [the shareholder was] rehabilitated," so there was "no predictive nexus between his past crime and his current and future fitness to be a Commission licensee"); *Teleprompter Cable Sys., Inc.*, 40 F.C.C.2d 1027, 1028 (1973) (noting that "violations of Federal antitrust laws are not absolutely disqualifying, but are a circumstance from which the Commission may draw inferences as to probable future conduct"). Moreover, the Commission may still grant *full*-power licenses to stations affiliated with former unlicensed broadcasters. Neither Congress nor the Commission has articulated any justification for this double standard. If former misconduct portends non-compliance with Commission regulations, why shouldn't former violators of any relevant federal law or regulation be ineligible to apply for any broadcast license?

Of course, "Congress ordinarily need not address a perceived problem"—here, the possibility of future regulatory violations by past wrongdoers—"all at once," but we have rejected this "facile one-bite-at-a-time explanation" for otherwise inexplicable underinclusiveness in "rules affect-

ing important First Amendment values." *News Am.*, 844 F.2d at 815. Our dissenting colleague omits the latter half of this quoted passage, arguing that even in the First Amendment context, Congress may "permissibly tackle a single part of a perceived problem . . . through a statute . . . which is neither overinclusive nor underinclusive." Dissent at 2 & n.2. But the RBPA's underinclusiveness (and indeed its overinclusiveness, too, as we discuss below) is the precise issue at hand. The dissent's argument proves too much, relabeling any perceived underinclusiveness as a permissible attempt to address "a single part of a perceived problem." Dissent at 1335 n.2.

The character qualification provision is poorly aimed for another reason: It covers circumstances only marginally related to the purpose of increasing regulatory compliance. For example, the provision bans applications from former unlicensed operators who violated the licensing requirement only briefly or long ago; from operators who have since exhibited, in whatever manner, an ability to abide by federal laws and regulations; from operators who plan to serve only as members of a multi-member board, rather than as president or CEO of an applicant station; from operators who shut down immediately upon receiving a Commission order to do so; and, most tellingly, from operators who were unaware of the licensing requirement at the time of the violation. Again, neither Congress nor the Commission has explained how a restriction that ignores such factors accurately targets those former pirates who pose a real risk of future malfeasance.

These examples of the character qualification provision's under- and overinclusiveness are particularly troubling given the ready availability of a less restrictive and better aimed alternative: the analogous provision in the

First Low-Power Rulemaking, which allowed for the possibility of waiver in certain circumstances and applied only to former pirates who continued to operate in spite of a Commission request to shut down. *Cf. NCCB*, 436 U.S. at 802 n.20, 98 S.Ct. at 2116 n.20 ("The reasonableness of the [challenged cross-ownership] regulations as a means of achieving diversification is underscored by the fact that waivers are potentially available from . . . [the] rules in cases in which a broadcast station and a co-located daily newspaper cannot survive without common ownership."); *also News Am.*, 844 F.2d at 814 (questioning Congress's chosen approach to the identified problem of "temporary waivers 'creeping' into permanence" and suggesting alternative legislative solutions). Though potentially still underinclusive, such a limited restriction would not only permit the Commission to grant a license to rehabilitated former pirates, but more accurately identify likely future rule-breakers. Indeed, adopting this limited regulatory restriction in the first place, the Commission rejected the very per se ban that Congress has now enacted, *see* First Low-Power Rulemaking, 15 F.C.C. Rcd. at 2225-26, reasoning that "[t]he reliability as licensees of parties who . . . illegally operated for a time but . . . ceased operation after being advised of an enforcement action . . . is not necessarily as suspect" as that of "[p]arties who persist[ed] in unlawful operation after the Commission [took] . . . enforcement actions," Low-Power Proposal, 14 F.C.C. Rcd. at 2498.

Overall, therefore, we find the character qualification provision so poorly aimed at maximizing future compliance with broadcast laws and regulations as to "raise[ ] a suspicion" that perhaps Congress's "true" objective was not to increase regulatory compliance, but to penalize

microbroadcasters' "message." *News Am.*, 844 F.2d at 805. Indeed, Ruggiero expressly alleges viewpoint discrimination, pointing to statements in the record that suggest many former pirates violated the licensing requirement solely because they questioned the constitutionality of the now-defunct microbroadcasting ban and viewed their piracy as "civil disobedience." *See, e.g.*, Creation of Low Power Radio Serv., Comment of Civil Rights Orgs., reprinted in J.A. 325 ("[O]ne who broadcasts openly, willingly accepting that the government will attempt to shut her station down, is engaging in an act of civil disobedience."); Creation of Low Power Radio Serv., Comment of Professor Robert McChesney, reprinted in J.A. 339 ("The tremendous demand for microradio is demonstrated by the emergence of a national Free Radio Movement, widespread civil disobedience, . . . as well as the proliferation of unlicensed community radio stations . . . whose operators broadcast at the risk of financial losses, seizure of property, arrest, and in some cases, imprisonment."). We need neither endorse the pirates' tactics—in fact, in *Grid Radio*, 278 F.3d at 1821-22 (also issued today), we reject an argument that penalizing microbroadcasting piracy violates the First Amendment—nor believe the RBPA discriminates against pirates' "message" to conclude, as we did in *News America*, that the provision's inaccurate aim is fatal.

We emphasize that this result does not leave Congress and the Commission powerless to bar some past pirates from applying for licenses. While that might well be the outcome were we applying intermediate scrutiny, we read *News America*'s more permissive standard as leaving ample room for a carefully aimed licensing restriction. Indeed, the Commission already has authority under its general character qualification provision to deny licenses

to individual pirates who, in the Commission's considered judgment, have demonstrated an inability to "comply with the Communications Act and [Commission] rules and policies." Policy Regarding Character Qualifications in Broad. Licensing, 102 F.C.C.2d at 1183. Even under the *News America* standard, however, we cannot sanction an automatic and permanent restriction on unlicensed broadcasters' future lawful speech without understanding why their misdeeds warrant a penalty so much more severe than that applied to any other misconduct. Yet neither the RBPA itself, nor the legislative history, nor the record in this case provides a satisfactory explanation. We thus have no choice but to declare the statute and the Commission's implementing regulation unconstitutional.

V.

The petition for review is granted, the Second Low-Power Rulemaking is vacated, and this matter is remanded to the Commission for further proceedings not inconsistent with this opinion.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting:

I dissent from the majority's holding that the challenged provision of the Radio Broadcasting Preservation Act (Act)—withholding future low power FM (LPFM) licenses from those who have illegally engaged in LPFM broadcasting in the past—falls short of the "something more than minimum rationality"standard adopted in *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988). Quoting *News America*, the majority charges that the Act's license restriction is so "poorly aimed at maximizing

future compliance with broadcast laws and regulations as to 'raise[ ] a suspicion' that perhaps Congress's true objective was not to increase regulatory compliance, but to penalize pirate microbroadcasters' 'message.'" Maj. Op. at 1333 (quoting 844 F.3d at 805). This case, however, is nothing like *News America*.

In *News America* the court overturned a funding resolution that barred the FCC from using appropriated funds "'to extend the time period of current grants of temporary waivers to achieve compliance with such rules.'" 844 F.2d at 802 (quoting Pub. L. No. 100-202, 101 Stat. 1329, 34 (1987)). The court found the provision "astonishingly underinclusive" for two reasons. First, it did not prohibit extension of waivers granted after its enactment but only of those already in existence. Second, it forbade only extensions of existing waivers and not the granting of new waivers. In fact, because of its narrow focus the restriction affected only a single party, *News America Publishing, Inc.*, a corporation owned by Rupert Murdoch, striking him, in the court's words, "with the precision of a laser beam." 844 F.2d at 814. By contrast, the license restriction here applies to the entire class of those who as of the time of their license applications have unlawfully engaged in LPFM broadcasting.[1] Further, the restriction substantially furthers the plain intent of the Congress which believed that "the operation of an unlicensed station demonstrates a

[1] This class includes persons who broadcast illegally after the Act's passage as well as those who had already done so before enactment. It is therefore not a "closed" class as was the case in *News America*. *See* 844 F.2d at 810 & n. 13 (noting that challenged provision "impinges on a closed class" because "Murdoch is not only the sole current member of the class, but is the sole party that can ever be a member").

lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public, and those individuals or groups should not be permitted to receive licenses in the LPFM service." H.R. Rep. No. 506 at 8 (2000). What could be more reasonable or logical than to suspect that those who ignored the Commission's LPFM broadcast regulations in the past are likely to do so in the future and therefore to head them off. The majority claims this class is underinclusive because it excludes a host of other scofflaws such as "civil wrongdoers, felons, and even inveterate regulatory violators other than pirates." Maj. Op. at 1332. As the majority acknowledges, however, "'Congress ordinarily need not address a perceived problem . . . all at once.'" Maj. Op. at 14 (quoting *News America*, 844 F.2d at 815.).[2] It is no sur-

[2] As the majority points out, the court in *News America* noted other courts' rejection of the "one-bite-at-a-time explanation for rules affecting important First Amendment values." *News America*, 844 F.2d at 815, quoted in Maj. Op. at 1332. Judging from the examples cited in *News America*, the court meant only that a proffered governmental interest will not suffice if the challenged statute does not reasonably serve the interest, that is, if the statute is underinclusive or overinclusive or both. *See FCC v. League of Women Voters*, 468 U.S. 364, 396, 104 S.Ct. 3106, 3126, 82 L.Ed.2d 278 (1984) (striking down statute of "patent overinclusiveness and underinclusiveness" because it "clearly 'provide[d] only ineffective or remote support for the government's purpose.'") (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564, 100 S.Ct. 2343, 2330, 65 L.Ed.2d 341 (1980)); *Community-Serv. Broadcasting v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (rejecting statute that "[a]t best . . . serves as an overly restrictive means" of achieving asserted purpose) (en banc). I see no reason the legislature cannot permissibly tackle a single part of a perceived problem (including one touching on the First Amendment) through a statute, such as the one here, which is neither overinclusive nor underinclusive.

prise that in legislation addressing LPFM licensing the Congress began with known violators of LPFM regulations. In any event, given that the class's members here are many and unidentified, *see supra* note 1, I am at a loss to understand how we can infer the Congress intended to punish any particular "message" the way the senators mentioned in *News America* targeted Murdoch's message.[3]

[3] As the News America court recounted, Murdoch was thoroughly excoriated in the Senate shortly after the Act was passed. *See News America*, 844 F.2d at 807-10.

APPENDIX E

SECTION 632 OF THE RADIO BROADCASTING PRESERVATION ACT OF 2000, PUB. L. NO. 106-553, 114 STAT. 2762

(a)(1) The Federal Communications Commission shall modify the rules authorizing the operation of low-power FM radio stations, as proposed in MM Docket No. 99-25, to—

> (A) prescribe minimum distance separations for third-adjacent channels (as well as for co-channels and first- and second-adjacent channels); and
>
> (B) prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934 (47 U.S.C. § 301).

(2) The Federal Communications Commission may not—

> (A) eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A); or
>
> (B) extend the eligibility for application for low-power FM stations beyond the organizations and entities as proposed in MM Docket No. 99-25 (47 CFR 73.853),

except as expressly authorized by an Act of Congress enacted after the date of enactment of this Act.

(3) Any license issued by the Commission to a low-power FM station prior to the date on which the Commission modifies its rules as required by paragraph

(1) and that does not comply with such modifications shall be invalid.

(b)(1) The Federal Communications Commission shall conduct an experimental program to test whether low-power FM radio stations will result in harmful interference to existing FM radio stations if such stations are not subject to the minimum distance separations for third-adjacent channels required by subsection (a). The Commission shall conduct such test in no more than nine FM radio markets, including urban, suburban, and rural markets, by waiving the minimum distance separation for third-adjacent channels for the stations that are the subject of the experimental program. At least one of the stations shall be selected for the purpose of evaluating whether minimum distance separations for third-adjacent channels are needed for FM translator stations. The Commission may, consistent with the public interest, continue after the conclusion of the experimental program to waive the minimum distance separations for third-adjacent channels for the stations that are the subject of the experimental program.

(2) The Commission shall select an independent testing entity to conduct field tests in the markets of the stations in the experimental program under paragraph (1). Such field tests shall include—

(A) an opportunity for the public to comment on interference; and

(B) independent audience listening tests to determine what is objectionable and harmful interference to the average radio listener.

(3) The Commission shall publish the results of the experimental program and field tests and afford an

opportunity for the public to comment on such results. The Federal Communications Commission shall submit a report on the experimental program and field tests to the Committee on Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate not later than February 1, 2001. Such report shall include—

(A) an analysis of the experimental program and filed tests and of the public comments received by the Commission;

(B) an evaluation of the impact of the modification or elimination of minimum distance separations for third-adjacent channels on—

(i) listening audiences;

(ii) incumbent FM radio broadcasters in general, and on minority and small market broadcasters in particular, including an analysis of the economic impact on such broadcasters;

(iii) the transition to digital radio for terrestrial radio broadcasters;

(iv) stations that provide a reading service for the blind to the public; and

(v) FM radio translator stations;

(C) the Commission's recommendations to the Congress to reduce or eliminate the minimum distance separations for third-adjacent channels required by subsection (a); and

(D) such other information and recommendations as the Commission considers appropriate.

47 U.S.C. § 301. LICENSE FOR RADIO COMMUNICATIONS OR TRANSMISSION OF ENERGY

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia, to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State where the effects of such use extends beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmissions or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t)); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in

accordance with this Act and with a license in that behalf granted under the provisions of this Act.

47 U.S.C. § 308. REQUIREMENTS FOR LICENSE

(a) Writing; exceptions. The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency when the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) Conditions. All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(c) Commercial communication. The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine cable licenses by section 2 of the Act entitled "An Act relating to the landing and the operation of submarine cables in the United States", approved May 27, 1921.

(d) Summary of complaints. Each applicant for the renewal of a commercial or noncommercial television

license shall attach as an exhibit to the application a summary of written comments and suggestions received from the public and maintained by the licensee (in accordance with Commission regulations) that comment on the applicant's programming, if any, and that are characterized by the comment or as constituting violent programming.

APPENDIX F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 01-100
MM Docket No. 99-25
RM-9208
RM-9242

In the Matter of

CREATION OF A LOW POWER RADIO SERVICE

SECOND REPORT AND ORDER

Adopted: March 22, 2001 Released: April 2, 2001

By the Commission: Commissioner Furchtgott-Roth approving in part, dissenting in part and issuing a statement.

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1. On December 21, 2000, President Clinton signed into law "Making Appropriations for the Government of the District of Columbia for FY 2001" (the "Act").[1] Section 632(a) of the Act requires the Commission to modify its rules for the low power FM ("LPFM") service[2] to pre-

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[1] Pub. L. No. 106-553, 114 Stat. 2762 (2000).

[2] *See Report and Order*, MM Docket No. 99-25, 15 FCC Rcd. 2205, *reconsideration generally denied, Memorandum Opinion and Order*, 15 FCC Rcd 19,208 (2000).

scribe LPFM station third adjacent channel interference protection standards and to prohibit any applicant from obtaining an LPFM station license if the applicant has engaged in the unlicensed operation of a station in violation of Section 301 of the Communications Act of 1934, as amended.[3] This *Report and Order* codifies these requirements and disposes of those pending LPFM new station applications directly impacted by these changes. In addition, it defines the scope of permissible minor amendments that may be filed by LPFM applicants outside window filing periods.

. . .

IV. Unlicensed Operations

10. Section 632(a)(1)(B) of the Act requires the Commission to modify its rules to "prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934 (47 USC 301)." The *LPFM Report & Order* generally applied the same character qualification requirements to LPFM station licensees as the Commission applies to full power licensees.[19] However, the Commission adopted the proposal set forth in the *LPFM NPRM* to permit in certain circumstances the grant of an LPFM station application even though a party to the application has engaged in illegal broadcast operations. Specifically, with regard to such a party the applicant must certify that it ceased engaging in the unlicensed operation of any station

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[3] 47 U.S.C. § 301.

[19] *LPFM R&O*, 15 FCC Rcd at 2226 (para. 53).

within 24 hours of a Commission directive to do so. Alternatively, in cases where no specific Commission directive to terminate was received, the party must have voluntarily ceased engaging in the unlicensed operation of any station no later than February 26, 1999.[20]

11. We amend Section 73.854 and direct the staff to modify FCC Form 318 to conform to the statutory language. We also will dismiss those applications now on file that responded "No" to FCC Form 318, Section III, Question 8(a). This item requests applicants to certify that neither the applicant nor any party to the application engaged in any manner in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended. The affected applications are listed in Appendix C. We note that the statutory language is not limited to applicants and licensees that have been found to have engaged in unauthorized operations by the Commission. Accordingly, an applicant will be ineligible to hold an LPFM license if it has engaged in unlicensed operation regardless of whether the Commission has made a specific finding that the party has engaged in such conduct. An applicant that responds "Yes" to Question 8(a) but which is subsequently determined to have engaged in unlicensed station operations will be dismissed and subject to additional enforcement actions. An LPFM station licensee subsequently found to have violated Section 301 will be subject to license revocation and other sanctions.

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[20] *See* 47 C.F.R. § 73.854(b); FCC Form 318, Section III, question 8.

Appendix C
FCC 01-100

Prefix	File Number	State	City	Chan.	Applicant Name
BNPL	20000531AAW	CA	CALIFORNIA	289	KYLE CETRULO
BNPL	20000531ACH	UT	ROY	217	STEVE SCOTT C/O A & B INC.
BNPL	20000601ABZ	CA	NIPOMO	300	ASSISTANCE IN MINISTRIES, INC.
BNPL	20000602ADX	CA	WATSON-VILLE	284	WATSONVILLE HUMAN RIGHTS COMMITTEE
BNPL	20000602AER	CA	SAN BERNARDINO	288	FOUNDATION FOR CALIFORNIA STATE UNIVERSITY, SAN BERNARDINO -
BNPL	20000602AFM	MD	HAVRE DE GRACE	296	STEVEN JAMES CLENDENIN
BNPL	20000605AAL	CA	HUME	267	HUME LAKE CHRISTIAN CAMPS
BNPL	20000605ABG	CA	SAN BERNARDINO	288	MARK WESTWOOD
BNPL	20000605ABY	LA	HARVEY	249	CRUTTI AUDIO SERVICES, L.L.C.

Prefix	File Number	State	City	Chan.	Applicant Name
BNPL	20000605ACB	CA	SIMI VALLEY	300	CALVARY CHAPEL OF SIMI VALLEY, INC.
BNPL	20000605AIE	CA	SAN DIEGO	290	PROPHET WORLD BEAT PRODUCTIONS
BNPL	20000605AIL	CA	ARROYO GRANDE	300	FRIENDS OF THE SOUTH COUNTY LIBRARY
BNPL	20000605AJL	CA	STOCKTON	239	INVISION COMMUNICATIONS
BNPL	20000605AJT	CA	SAN FRANCISCO	229	SAN FRANCISCO LIBERATION RADIO
BNPL	20000608ADA	ME	AUGUSTA	234	ALL THAT IS CATHOLIC MINISTRIES
BNPL	20000828ACC	IL	TAYLORVILLE	300	LANGLEY PARK TELECOMMUNICATIONS
BNPL	20000829ADN	IL	DECATUR	245	COMMUNITY POWER JAMS
BNPL	20000829ADT	MI	DETROIT	229	PENTECOSTAL CHURCH OF THE ETERNAL ROCK

Appendix D
FCC 01-100

Low Power FM Rule Modifications

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

Part 73—Radio Broadcast Services

. . .

3. Section 73.854(b) is deleted and Section 73.854 is modified as follows:

§ 73.854 Unlicensed operations

No application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner including individually or with persons, groups, organizations or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. Section 301.

APPENDIX G

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 99-6
MM Docket No. 99-25
RM-9208
RM-9242

In the Matter of

CREATION OF A LOW POWER RADIO SERVICE

NOTICE OF PROPOSED RULE MAKING

Adopted: January 28, 1999 Released: February 3, 1999

Comment Date: April 12, 1999
Reply Comment Date: May 12, 1999

By the Commission: Chairman Kennard and Commissioner Tristani issuing a joint statement; Commissioners Ness and Powell issuing separate statements; and Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. By this *Notice*, we are proposing to establish rules authorizing the operation of new, low power FM (LPFM) radio stations. In particular, we are proposing to create two classes of low power radio service, both of which would operate in the existing FM radio band: a 1000-watt primary service and a 100-watt secondary service. We also seek comment on whether to establish a third, "microradio" class of low power radio service that would operate in the range of 1 to 10 watts on a secondary basis. These proposals are in response to two petitions for rule making and related comments indicating substantial interest in, and public support for, increased citizens' access to the airwaves. We believe that these new LPFM stations would provide a low-cost means of serving urban communities and neighborhoods, as well as populations living in smaller rural towns and communities. In creating these new classes of stations, our goals are to address unmet needs for community-oriented radio broadcasting, foster opportunities for new radio broadcast ownership, and promote additional diversity in radio voices and program services. We are proposing that LPFM stations not be subject to certain technical rules currently applied to other classes of radio service. In particular, we believe that current restrictions on third-adjacent channel operations are not needed for LPFM stations, and we believe it may be possible to disregard second-adjacent channel interference for these stations as well. We address below how we may be able to do this. At the same time, we are also proposing new technical rules and geographic spacing requirements to ensure that new LPFM stations do not cause interference to existing full service FM radio stations. In adopting any

rules and requirements, we will also be wary of any provisions that would limit the development of future digital radio services.[1]

2. In this *Notice*, we review formal petitions we have received and the principal arguments of commenters supporting and opposing new low power radio service, and we provide our initial assessment of those arguments. We describe three types of low power service of varying power levels which, in each case or together, could meet local needs. As a general manner, we seek comment on whether any new services established should be operated strictly on a noncommercial basis. The *Notice* also addrsses related matters such a service rules, ownership issues, and applications processing procedures for LPFM services. We also welcome commenters to bring to our attention any alternatives or additions to our proposals that would serve our goals of encouraging community participation and the pro-

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[1] We have begun to receive requests for "experimental" authorizations for low power FM service that essentially would be identical to services now under consideration in this proceeding. We are concerned that many more individuals and entities may react to this *Notice* by attempting to "jump the gun" by also filing premature applications under the guise of requests for experimental stations. We do not consider it appropriate to prejudge the outcome of this rule making or to begin a premature race for authorizations by considering such requests at this time, and interested parties are advised to await the outcome of this proceeding to file applications pursuant to whatever rules we may establish if we authorize such service. We do not intend to process such applications unless they serve a legitimate and useful specified experimental purpose under controlled conditions for a limited time period appropriate to record experimental results. We also note that experimental broadcasts are not for regular program services and must be conducted on a strictly noncommercial basis. 47 C.F.R. § 74.182.

liferation of local voices, while protecting the integrity of the spectrum.

. . .

III. Service Proposals and Issue Analysis

A. Need for Low Power Radio Service

10. As discussed in our 1998 Biennial Review of broadcast ownership regulations, liberalization of our local radio ownership rules over the past few years has led to increasing ownership consolidation. *See Notice of Inquiry* in MM Docket No. 98-35, 13 FCC Rcd 11276, 11281-83 (1998) (*Biennial Review*"). The Commission has acknowledged the benefits to the public that may accrue from the economies of scale made possible by group station ownership. However, we are concerned that consolidation may have a significant impact on small broadcasters and potential new entrants into the radio broadcasting business by driving up station prices, thereby exacerbating the difficulty of entering the broadcast industry and of surviving as an independent operator.

11. Additionally, the Commission received over 13,000 inquiries in the last year from individuals and groups showing an interest in starting a low power radio station.[26] Furthermore, as noted above, hundreds of commenters have urged the Commission to create opportunities for low power, locally oriented radio service. These demonstrations of interest in low power radio service indicate tat new classifications of service could be outlets for new

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[26] For example, the low power radio fact sheet on the Commission's World Wide Web site is averaging more than 1,000 "hits" each month.

voices and program services to serve the public. Moreover, it appears that the variety of demands may best be met by more than one station type, as urged by many commenters. For example, a low power station could be designed to operate similar to a full-power station but on a smaller scale, as a service for an ethnic community dispersed throughout an entire city, as a supplementary commercial or noncommercial service, or simply as a low cost community service used principally to convey information to listeners, without concern for financial support.

12. Accordingly,we seek comment on whether a low power radio service could provide new entrants the ability to add their voices to the existing mix of political, social and entertainment programming, and could address special interests shared by residents of geographically compact areas. Numerous commenters state that alternative sources of information and entertainment are not readily available to dissatisfied speakers and listeners through the acquisition of an existing frequency, leased time from full power stations, an internet website,[27] or internet webcasting,[28] the last three of which do not require a license.[29] Commenters note that the first alternative is too restrictive and provides insufficient access and control to the speaker to meet the demand that has spawned this rule making pro-

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[27] Greater Media, Inc. Comments at 7.

[28] *Id.* at 7; Press Comments at 8.

[29] An example of broadcast radio programming made available over the internet is <www.airos.org>; The American Indian Radio on Satellite (AIROS) network is a national distribution system for Native programming to Tribal communities and to general audiences through Native American and other public radio stations as well as the internet.

ceeding. The consistent demand for various forms of low power radio stations, including microradio stations, indicates that many people interested in community broadcasting cannot afford either their own full power stations or whatever limited access to established stations may be available. Moreover, people with non-mainstream interests or unconventional views would have access to the airwaves only with the consent of a full power station owner, which could severely limit their range of expression. We recognize that the internet offers unprecedented opportunities to communicate inexpensively to others around the world and to receive information or programming of interest. However, at this time, internet access is not sufficiently mobile and ubiquitous to be considered a substitute for radio broadcasting's capability to reach the public, despite some opponents' contentions to the contrary.[30] Thus, it appears that low power radio offers opportunities to potential broadcasters and listeners for which there are currently no comparable alternatives. Commenters are invited to address these issues.

13. The technical parameters and other regulations for a particular service could affect not only the availability of frequencies for such stations, but also the nature of the licensees and listeners attracted to different types of stations and the resulting service. A higher power LPFM class with a larger service area would be more likely to attract more listeners, including listeners in vehicles, who account for a significant segment of the listeners of full power radio stations. Authorizing these as primary stations cold provide stability that could enable licensees to obtain

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[30] Press Comments at 8.

necessary funding to equip stations of this size and operate them in a manner that could more effectively serve the community; for example, perhaps a station could secure the resources to provide live coverage of high school sporting events or local civic or community meetings or events. At the same time,with a relatively small operating budget and a relatively small coverage area, such LPFM stations might be able to offer very localized exposure attractive to local businesses that could not otherwise afford radio advertising.

14. A lower power, less costly class of LPFM station, with secondary frequency use status and fewer operating and other regulatory requirements than full service broadcasters, might appeal to operators desiring to broadcast to smaller nonmobile audiences, especially if operated at locales where there would be little likelihood of channel displacement. As Skinner notes, such stations could often be operated by local volunteers. In some cases, stations might not be able to operate on a full-time basis or according to a regular schedule, but might still offer "niche" programming and important community event coverage and news and weather bulletins, such as school closing announcements.

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64. *Character Qualifications and Unauthorized Broadcasters.* We propose to apply the same standards for character qualifications requirements to all LPFM broadcasters as we do to full power broadcasters. *See Policy Statement and Order*, 5 FCC Rcd 3252 (1990), *recon. granted in part and denied in part*, 6 FCC Rcd 3448. *See also Report, Order, and Policy Statement* in Gen. Docket No. 81-500 and BC Docket No. 78-108, 102 FCC 2d 1179 (1986),

recon. granted in part and denied in part, 1 FCC Rcd 421 (1986). We do not see any reason to distinguish between LPFM (or microradio) and other broadcast licensees for this purpose. Commenters believing otherwise are invited to explain the rationale for any distinction.

65. We note how this issue relates to the particular issue of previously and currently unlicensed operators. Unlicensed radio operators not only violate the longstanding statutory prohibition against unlicensed broadcasting[82] and our present rules on unlicensed broadcasting,[83] but they also use equipment of unknown technical integrity.Such illegal radio transmissions raise a particular concern because of the potential for harmful interference to authorized radio operations, including public safety communications and aircraft frequencies. For example, in March, 1998, the Commission closed down an unlicensed radio operation in Sacramento, California, that had disrupted air traffic control communications on four separate occasions.[84] We have also shut down illegal broadcast operations that were causing harmful interference to air traffic control communications at the Miami and West Palm Beach, Florida, airports.[85]

66. The Commission has repeatedly urged all unlicensed radio operators to cease broadcasting. When they have not, we have filed complaints in federal district courts to shut them down by seeking: (1) injunctive relief pursuant to 47 U.S.C. § 401; (2) seizure and forfeiture of the radio station

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82 47 U.S.C. § 301.

83 *See, e.g.*, Part 15 of the Commission's rules, 47 C.F.R. Part 15.

84 *See News Release* Report No. C1 98-3 (March 20, 1998).

85 *See News Release* Report No. C1 97-12 (October 24, 1997).

equipment pursuant to 47 U.S.C. § 510; (3) monetary forfeitures pursuant to 47 U.S.C. § 503; and/or (4) criminal penalties pursuant to 47 U.S.C. § 501. In addition, we have issued cease and desist orders pursuant to 47 U.S.C. § 312 to a number of unlicensed broadcasters. Nevertheless, despite repeated warnings by Commission officials and the Commission's successes in federal district court litigation, *see United States v. Dunifer*, 997 F.Supp. 1235 (N.D. Cal. 1998), *appeal pending*, No. 99-15035 (9th Cir. 1999) (injunction); *United States v. Amy and All Radio Station Transmission Equipment*, 1998 WL 884468 (E.D. Mich. 1998), *appeal pending*, No. 98-2396 (6th Cir. 1999) (seizure and forfeiture of radio station equipment), some unlicensed broadcasters have persisted in their unlawful activity.

67. It is well established that the Commission is rightfully concerned with "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1190-91 (1986). Parties who persist in unlawful operation after the Commission has taken any of these enforcement actions could be deemed *per se* unqualified, and we seek comment as to the eligibility of such parties for a license i any new radio service. We seek comment on whether there are circumstances under which such a party could be considered rehabilitated. The reliability as licensees of parties who may have broadcast illegally but have promptly ceased operation when advised by the Commission to do so,[86] or who

[86] Of course, as authorized Commission licensees, LPFM broadcasters that violate Commission rules would be subject to the enforce-

voluntarily cease operations within ten days of the publication of the summary of this *Notice* in the *Federal Register*.

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ment rules (including forfeiture amounts) that apply to other broadcasters, rather than those that now apply to unlicensed operators.

APPENDIX H

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 00-19
MM Docket No. 99-25
RM-9208
RM-9242

In the Matter of

CREATION OF A LOW POWER RADIO SERVICE

REPORT AND ORDER

Adopted: January 20, 2000 Released: January 27, 2000

By the Commission: Chairman Kennard and Commissioners Ness and Tristani issuing separate statements; Commissioner Furchtgott-Roth dissenting and issuing a statement; and Commissioner Powell approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. With this *Report & Order*, we authorize the licensing of two new classes of FM radio stations—one operating at a maximum power of 100 watts and one at a maximum power of 10 watts. Both types of stations, known as low power FM stations (LPFM), will be authorized in a manner that protects existing FM service. They will be operated on a noncommercial educational basis by entities that do not hold an attributable interest in any other broadcast station or other media subject to our ownership rules. Initially, only entities located in the communities the stations serve will be eligible to participate in this service. Even once this eligibility criterion is relaxed, we will grant a significant selection preference to locally-based applicants. We believe that the LPFM service authorized in this proceeding will provide opportunities for new voices to be heard and will ensure that we fulfill our statutory obligation to authorize facilities in a manner that best serves the public interest.

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17. *Decision.* We will establish LPFM as a noncommercial educational service. Our goals in establishing this new service are to create opportunities for new voices on the air waves and to allow local groups, including schools, churches and other community-based organizations, to provide programming responsive to local community needs and interests. We believe that a noncommercial service is more likely to fulfill this role effectively than a commercial service. Commercial broadcast stations, by their very nature, have commercial incentives to maximize audience size in order to improve their ratings and thereby increase their advertising revenues. We are concerned that these

commercial incentives could frustrate achievement of our goal in establishing this service: to foster a program service responsive to the needs and interests of small local community groups, particularly specialized community needs that have not been well served by commercial broadcast stations. We believe that noncommercial licensees, which are not subject to commercial imperatives to maximize audience size, are more likely than commercial licensees to serve small, local groups with particular shared needs and interests, such as linguistic and cultural minorities or groups with shared civic or educational interests that may now be underserved by advertiser-supported commercial radio and higher powered noncommercial radio stations.[29] We note that commenters addressing this issue favored establishing LPFM as a noncommercial service by a substantial margin, though some have argued that a commercial service could provide ownership opportunities for new entrants.[30] While we have considered the entrepreneurial opportunities that low power radio stations might create, we nonetheless conclude that a noncommercial service would best serve the Commission's goals of bringing additional diversity to radio broadcasting and serving local community needs in a focused manner.[31]

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[29] Comments of Civil Rights Organizations at 16-17

[30] *See e.g.*, Comments of UCC, et al. at 25-26 (commercial low power stations could provide an important entrepreneurial opportunity for members of demographic groups that have historically been underrepresented in the broadcast industry as licensees and professionals).

[31] While opposing the establishment of an LPFM service generally, NPR stated that "if there can be some assurance that prospective licensees will serve the community and the public interest, it is by" applying the "current eligibility criteria" for noncommercial educational licensees to all LPFM stations. Comments of NPR at 29-30.

18. Establishing LPFM as a noncommercial service will have the added benefit of giving us additional flexibility to assign licenses for this service in a manner that is most likely to place them in the hands of local community groups that are in the best position to serve local community needs. As a general matter, where mutually exclusive applications are filed for initial commercial licenses or construction permits, the licenses or permits must be awarded by competitive bidding pursuant to 47 U.S.C. § 309(j). Licenses for noncommercial educational broadcast stations, as described in Section 397(6) of the Act, however, are not subject to competitive bidding.[32] Accordingly, having decided to establish LPFM as a noncommercial service, we will require that LPFM licensees comply with the eligibility requirements of Section 397(6) of the Act.[33]

19. Section 397(6) of the Act defines "noncommercial educational broadcast station" as a station which:

(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which

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[32] *See* 47 U.S.C. § 309(j)(2)(C) and 397(6).

[33] As discussed below, we will license LPFM stations to operate in both reserved and non-reserved portions of the FM band. Nevertheless, the same eligibility and noncommercial service restrictions will apply to all LPFM stations, regardless of the portion of the FM band in which they are licensed to operate. In this regard, LPFM NCE stations will be different from full-service NCE stations that operate in the non-reserved band. The latter can convert from NCE status to commercial status at will by filing a notification letter with the Commission, but LPFM stations will not be permitted to change their noncommercial status.

is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

(B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.[34]

Since the statute incorporates by reference the Commission's noncommercial eligibility rules, we must look to those rules in determining noncommercial eligibility under Section 397(6) of the Act. The Commission's rules limit eligibility for noncommercial radio stations to nonprofit educational organizations that show that the station will be used "for the advancement of an educational program."[35] In applying this rule, the Commission has required that applicants be (a) a government or public educational agency, board or institution, or (b) a private, nonprofit educational organization, or (c) a nonprofit entity with a demonstrated educational purpose.[36] We require that an applicant described in (a) or (b) have an educational program and demonstrate how its programming will be used for the advancement of that program. An applicant apply-

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[34] 47 U.S.C. § 397(6).

[35] 47 U.S.C. § 73.503(a). The same eligibility requirements were in effect on the effective date of Section 397(6) of the Act. *See also* Appendix A to *Notice of Inquiry*, In the Matter of Eligibility for Noncommercial Educational FM and TV Broadcast Station Licenses, BC No. 78-164, FCC 77-382, 43 Fed. Reg. 30842 (1978), 30844 (processing guidelines for institutional and organizational applicants for noncommercial educational licenses).

[36] *See generally* Appendix A to *Notice of Inquiry*, In the Matter of Eligibility for Noncommercial Educational FM and TV Broadcast Station Licenses, BC No. 78-164, FCC 77-382, 43 Fed. Reg. 30842, 30844 (1978).

ing as (c) must specifically show (i) that it is in fact a non-profit educational organization, (ii) that it has an educational objective, and (iii) how its programming will further that objective.[37]

20. The requirement that NCE licensees provide programming that advances an educational objective may be satisfied by a variety of programs, including but not limited to "instructional programs, programming selected by students, bible study, cultural programming, in-depth news coverage, and children's programs such as Sesame Street that entertain as they teach."[38] We have also stated that "in order to qualify as an educational station, it is not necessary that the proposed programming be exclusively educational."[39] Given the latitude that entities have under our rules to qualify as NCEs, we do not believe that limiting eligibility for LPFM licenses to NCEs will unduly limit the range of groups that will be eligible to apply for LPFM licenses or the services that they can provide.[40]

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[37] *See, e.g.*, In re Applications of Music Ministries, Inc. and Community Education and Religious Broadcasting, *Hearing Designation Order*, 9 FCC Rcd 3628 (Aud. Serv. Div. 1994).

[38] *Further Notice of Proposed Rulemaking*, In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31, FCC No. 98-269, 13 FCC Rcd 21167, 21169 (1998).

[39] *Memorandum Opinion and Order*, In re Application of Lower Cape Communications, Inc., FCC 80-453, 47 RR2d 1577, 1579 (1980). *See also Memorandum Opinion and Order, Florence Bridges*, FCC 78-719, 44 RR2d 667, 668 (1978).

[40] We note, however, that individuals cannot qualify as NCEs.

49. *Decision.* We will apply rules similar to the existing commercial attribution rules to determine a licensee's compliance with the ownership limits set forth above. Because many of the entities that will hold LPFM licenses will be non-stock corporations (or other non-stock entities), we will attribute the interests of the applicant, its parents, its subsidiaries, their officers and members of their governing boards. If an entity that holds an LPFM license does have stock, then the existing attribution rules will apply and voting stock interest of 5% or more will be attributable unless the investor is passive in nature, in which case voting stock interests of 20% or more will be attributable. Partners and non-insulated limited partners are attributable, as are officers and directors. Non-voting stock and debt are not attributable unless they satisfy the "equity-debt-plus" standards set forth in our recent attribution order.[85] Thus, for example, if a full-power broadcaster in a community were to invest in an LPFM licensee in that same community and the investment accounted for more than 33% of the LPFM's total capitalization, the investment would be attributable and would violate the cross-ownership ban discussed above. Similarly, if a director of the same full power broadcaster were to act as an officer of the LPFM, the director would be attributed with both stations and would violate the ban. Consistent with the existing commercial attribution rules,[86] however, an

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[85] *Report and Order* in MM Docket Nos. 94-150, 92-51 & 87-154, FCC 99-207 (August 6, 1999) ("*Attribution R&O*").

[86] 47 C.F.R. § 73.3555 Note 2(h) ("The officers and directors of a parent company of a broadcast licensee, cable television system or daily newspaper, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved

exception will apply to certain officers and directors of the parent of an LPFM applicant or licensee. Such an officer or director may hold otherwise attributable interests in a broadcast licensee or other media entity subject to our ownership rules without making the LPFM applicant ineligible, provided the duties and responsibilities of the officer or director are wholly unrelated to the LPFM station and the officer or director recuses himself or herself from consideration of any matters affecting the LPFM station.[87] This exception will avoid making ineligible entities that will serve the purposes of this service well, such as universities or schools, which may have large and diverse board membership, while protecting against control of an LPFM licensee by ineligible media owners. For the same reason, in the LPFM context we will extend the exception to officers and directors of the LPFM applicant or licensee itself, if that entity is a multifaceted organization, such as a university, and the duties and responsibilities of the officer or director are wholly unrelated to the LPFM station and the officer or director recuses himself or herself from consideration of any matters affecting the LPFM station.[88]

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are wholly unrelated to the broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission."); *see also* Attribution of Ownership Interests, 97 FCC 2d 997 (1984), *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986).

[87] Given the nature of the LPFM service and our goal of limiting the burdens imposed on the service, we will not require the submission of a statement to the Commission documenting this recusal (cf. 47 C.F.R. § 73.3555 Note 2(h)), but we expect licensees to effect such a recusal and to abide by it.

[88] Unlike in the commercial attribution rule, we will not require the applicant or licensee to seek a waiver under these circumstances. See 47 C.F.R. § 73.3555 Note 2(h).

We emphasize that these exceptions are narrow in scope. An individual holding an attributable media interest may not act as an officer of the LPFM station, nor function in any other attributable role.

50. We will, moreover, include an attribution exception for local chapters of national or other large organizations. In the event that a local chapter can demonstrate that it: (1) is separately incorporated, and (2) has a distinct local presence and mission, the local chapter can apply for a license in its own right and the national entity's "ownership" will not be attributed to it. In order to meet this standard, the local entity must be able to show a significant membership within the community, as well as a local purpose that can be distinguished from its national purpose. For example, the general purpose of raising awareness of the toxic waste problem in the United States would not suffice, but raising awareness of the toxic waste problem in particular local areas would meet the local purpose standard.

6. General Character Qualifications and Unlicensed Broadcasters

51. *Background.* In the Notice, we generally proposed to apply the same standards for character qualification requirements to all LPFM broadcasters as we do to full power broadcasters. The Commission asked if commenters saw any reason to distinguish between full and low power radio licensees for this purpose. In addition, we sought comment on whether to disqualify unlicensed broadcasters who once violated or who still are violating Commission rules. We sought comment on whether the Commission should adopt a middle ground and accept applications from parties who have broadcast illegally, but who either (1) promptly ceased operation when advised by the Com-

mission to do so, or (2) voluntarily ceased operation within ten days of the publication of the *Notice* in the *Federal Register*.

52. *Comments.* The National Lawyers Guild and the Civil Rights Organizations both argue for amnesty for unlicensed broadcasters.[89] Many individuals insist that without radio "pirates," LPFM would not have been created.[90] Others, such as Amherst and UCC, et al., support the middle ground set forth in the *Notice*, saying that it is most fair to the interests of future low power broadcasters and to the public.[91] The Alliance for Community Media also supports the Commission's proposed compromise.[92] Many commenters believe that anyone who has operated illegally should not be eligible for a license. NAB believes that because "pirate" broadcasters operated illegally, they should not be excused or granted amnesty.[93] Some object to restricting parties with an interest in a broadcast station from owning an LPFM station, but allowing "pirates" to own them.[94]

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[89] Comments of the National Lawyers Guild, etc. at 3-4; Comments of Civil Rights Organizations at 33.

[90] *See, e.g.*, Comments of Stephen G. Toner at 2.

[91] Comments of Amherst at 56; Comments of UCC, et al. at 33.

[92] Comments of Alliance for Community Media at 5.

[93] Comments of NBA at 74.

[94] Comments of Wisconsin Rapids Broadcasting, L.L.C. d/b/a WHFR/WGLX Radio at 3-4. Many others object to "rule-breakers" receiving licenses. Comments of Colorado West Broadcasting, Inc. at 2; Comments of North Cascades Broadcasting, Inc. at 8; Comments of Omni Communications, Inc. at 6; Comments of Association of Islamic Charitable Projects at 1.

53. *Decision.* We have decided, as we proposed, to apply the same character qualification requirements to low power station licensees as we currently apply to full power licensees. The Commission's character policy is underpinned by our interest in a licensee's truthfulness and reliability. We have a critical need to ascertain whether a licensee will in the future be forthright in its dealings with the Commission and operate its station in a manner consistent with the requirements of the Communications Act and the Commission's rules and policies.[95] No commenter showed a reason to distinguish between full and low power broadcasters on this basis, and we do not believe one exists.

54. The most significant specific question that character concerns raise in the context of this proceeding, as discussed in the *Notice*, is how past illegal broadcast operations reflect on that entity's proclivity "to deal truthfully with the Commission and to comply with our rules and policies,"[96] and thus on its basic qualifications to hold a license. We are persuaded to adopt our original proposal and accept a low power applicant who, if it at some time broadcast illegally, certifies, under penalty of perjury, that: (1) it voluntarily ceased engaging in the unlicensed operation of any station no later than February 26, 1999, without specific direction to terminate by the FCC; or (2) it ceased engaging in the unlicensed operation of any facility within 24 hours of being advised by the Commission to do so. Applicants will be required to make such certifications

[95] Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, ¶¶ 54-55 (1986); *recon. granted in part and denied in part*, 6 FCC Rcd 3448 (1991).

[96] *Id.*

as part of their applications for an LPFM station. Such certifications will be made with respect to the applicant as well as all parties to the application (*i.e.*, any party with an attributable interest in the applicant). Submission of false or misleading certifications will subject the applicant to enforcement action including fines, revocation of license and criminal penalties.

55. Contrary to some commenters' arguments, this rule does not unconstitutionally infringe on the First Amendment rights of unlicensed broadcasters.[97] Disqualification under this rule is based solely on lack of compliance with statutory and regulatory requirements. All parties should note, however, that as licensed broadcasters, ignorance, whatever its cause, is not considered an excuse for violation, and full compliance with our rules will be required. Moreover, as implied by the provisions of the *Notice*, the illegality of unauthorized broadcasting must now be presumed to be well-known, and any unlicensed broadcast operation occurring more than 10 days after the *Notice* was issued will make the applicant ineligible for low power, full power, or any other kind of license and will be subject to fines, seizure of their equipment, and criminal penalties.

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[97] *See National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

APPENDIX A

Low Power FM Service Rules

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21. A new Section 73.854 is added, as follows:

§ 73.854 Unlicensed operations.

No application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, to one of the following statements:

(a) Neither the applicant, nor any party to the application, has engaged in any manner including individually or with persons, groups, organizations or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. Section 301.

(b) To the extent the applicant or any party to the application has engaged in any manner, individually or with other persons, groups, organizations or other entities, in the unlicensed operation of a station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. Section 301, such an engagement:

(1) ceased voluntarily no later than February 26, 1999, without direction from the FCC to do so; or

(2) ceased operation within 24 hours of being directed by the FCC to terminated unlicensed operation of any station.

APPENDIX I

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 00-349
MM Docket No. 99-25
RM-9208
RM-9242

In the Matter of

CREATION OF A LOW POWER RADIO SERVICE

MEMORANDUM OPINION AND ORDER
ON RECONSIDERATION

Adopted: September 20, 2000

Released: September 28, 2000

By the Commission: Chairman Kennard and Commissioner Ness issuing separate statements; Commissioner Furchtgott-Roth dissenting and issuing a statement; and Commissioner Powell concurring in part, dissenting in part and issuing a statement.

. . .

I. BACKGROUND

1. In January, we adopted a Report and Order establishing a low power FM radio service.[1] We authorized this new service to provide opportunities for new voices to be heard, while at the same time preserving the integrity and technical excellence of existing FM radio service and safeguarding its transition to a digital transmission mode. In this Memorandum Opinion and Order on Reconsideration, we dispose of petitions for reconsideration[2] of the Report and Order, make certain changes to our rules, and provide certain clarifications of our rules.[3]

. . .

7. Unlicensed Broadcasters

95. In the Report and Order, we determined that unauthorized broadcasters would not be eligible for LPFM licenses unless they could certify that they (1) promptly ceased operation when directed by the Commission to do so if that direction was received prior to February 26, 1999, or (2) voluntarily ceased operation by February 26, 1999 (within 10 days of the publication of the *Notice* in

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[1] *Report and Order*, MM Docket No. 99-25, 15 FCC Rcd 2205 (2000).

[2] Hereinafter the *Memorandum Opinion and Order*. The list of petitioners is attached at Appendix E.

[3] Both Amherst Alliance and Don Schelhardt filed Motions for a Decision on their respective reconsideration petitions, urging the Commission to act on their reconsideration petitions before issuing licenses. We dismiss these petitions as moot. To the extent the motions raise new arguments, we dismiss them as untimely filed Petitions for Reconsideration.

the *Federal Register*.)[137] In no event will an unlicensed broadcaster be eligible for an LPFM license if it continued illegally broadcasting after February 26, 1999.[138] Don Schellhardt requests that we allow unlicensed broadcasters to apply for LPFM licenses if: (1) the unauthorized broadcaster challenged the legality of an FCC order to cease operations and/or sought an injunction to bar the FCC from enforcing such an Order, and (2) the court "allowed" the unlicensed broadcaster to continue operating while the legal challenge was pending.[139]

96. We reject Shellhardt's request. As discussed in the *Report and Order*, our rule on unlicensed broadcasters was based on our concern that past illegal broadcast operations reflect on the entity's proclivity to deal truthfully with the Commission and to comply with our rules and policies. We continue to believe that a party that continued to operate in contravention of an FCC direction to cease operations should not be eligible to apply for an LPFM license. Such a party should have ceased its illegal broadcast while pursuing any legal challenge to a Commission order.[140] Any party ignoring our order has demonstrated an unwillingness to comply with the Commission's rules and thus should not be rewarded with an LPFM license. For the same reasons, we reject Schellhardt's request that those

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[137] *Report and Order*, 15 FCC Rcd at 2225-27, ¶¶ 51-55.

[138] We have modified Rule 73.854 to make clear that no unlicensed broadcaster that continued to broadcast after February 26, 1999 will be eligible for an LPFM license.

[139] Schellhardt Petition at 1-2.

[140] We are not aware of any circumstances in which a court has ordered a stay of an FCC order to cease illegal broadcast operations.

who flagrantly violated a Commission order to cease operating and "continued to broadcast while in hiding" or after losing a court challenge be eligible for "probationary licenses."[141]

. . .

Appendix A

Low Power FM Service Rule Modifications

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

. . .

Section 73.854 is modified as follows:

§ 73.854 Unlicensed operations.

No application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, to one of the following statements:

(a) Neither the applicant, nor any party to the application, has engaged in any manner including individually or with persons, groups, organizations or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. Section 301.

(b) To the extent the applicant or any party to the application has engaged in any manner, individually or with other persons, groups, organizations or other entities, in the unlicensed operation of a

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[141] Schelhardt Petition at 6.

station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. Section 301, such an engagement:

(1) ceased voluntarily no later than February 26, 1999, if not previously directed by the FCC to cease operation; or

(2) ceased operation within 24 hours of being directed by the FCC to terminate unlicensed operation of any station but in no event later than February 26, 1999.

Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

No. 02-1608

In the Supreme Court of the United States

GREG RUGGIERO, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
MARK S. DAVIES
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act (RBPA), Pub. L. No. 106-553, 114 Stat. 2762, which requires the Federal Communications Commission to prohibit any person from obtaining a low power FM radio license if that person "has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934," is constitutional.

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In the Supreme Court of the United States

No. 02-1608

GREG RUGGIERO, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 3a-49a) is reported at 317 F.3d 239. The opinion of the panel of the court of appeals (Pet. App. 52a-75a) is reported at 278 F.3d 1323.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 1a-2a) was entered on January 31, 2003. The petition for a writ of certiorari was filed on May 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal law has long prohibited persons from "us[ing] or operat[ing] any apparatus for the transmis-

sion of energy or communications or signals by radio" without a license from the Federal Communications Commission (FCC or Commission). 47 U.S.C. 301. Broadcast licenses may be granted only if the "public interest, convenience, and necessity will be served," 47 U.S.C. 309(a), and only upon applications that "set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station," 47 U.S.C. 308(b).

Congress has vested the FCC with a broad array of powers to prevent persons from broadcasting without a license. The Commission may seek an injunction, 47 U.S.C. 401, issue a cease-and-desist order, 47 U.S.C. 312(b), or impose a monetary forfeiture, 47 U.S.C. 503(b). Any equipment used "with willful and knowing intent" to engage in unlicensed broadcasting "may be seized and forfeited to the United States." 47 U.S.C. 510(a). In addition, persons who willfully and knowingly violate the Communications Act of 1934 are subject to criminal penalties, including fines and imprisonment. 47 U.S.C. 501.

2. a. For many years, the FCC licensed a category of noncommercial educational radio stations, known as Class D stations, that were permitted to operate with a maximum of ten watts of power. Pet. App. 5a. Subsequently, in order to promote "the opportunity for other more efficient operations," the FCC halted the further licensing of such radio stations. *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C. 2d 240, 248-249, ¶¶ 23-24 (1978); see Pet. App. 5a. Thereafter, noncommercial educational FM radio stations were generally required to operate at a minimum power of 100 watts. 47 C.F.R. 73.511(a); see Pet. App. 5a.

In the ensuing years, a number of persons and entities began operating low-power FM (LPFM) radio stations without seeking or obtaining licenses. Pet. App. 5a. As a result, the FCC was forced to devote considerable resources to the enforcement of the Communications Act's basic broadcast licensing requirement against unlicensed LPFM broadcasters. *Ibid.*

b. In 1999, in response to petitions for rulemaking, the FCC proposed to modify its rules to create, *inter alia*, a class of LPFM radio service operating at 100 watts of power. See Notice of Proposed Rule Making, *Creation of a Low Power Radio Service*, 14 FCC Rcd 2471, ¶ 1 (1999) (Pet. App. 89a-98a). After considering comments, the FCC adopted rules authorizing the licensing of LPFM radio stations. Report and Order, *Creation of Low Power Radio Service*, 15 FCC Rcd 2205, 2206, ¶ 1 (2000) (Pet. App. 99a-111a).

Those rules disqualified all but a narrow class of unlicensed broadcasters from the new LPFM service. In particular, the rules prohibited unlicensed broadcasters from obtaining an LPFM license unless the applicant "certifie[d], under penalty of perjury, that: (1) it voluntarily ceased engaging in the unlicensed operation of any station no later than February 26, 1999, without specific direction to terminate by the FCC; or (2) it ceased engaging in the unlicensed operation of any facility within 24 hours of being advised by the Commission to do so." 15 FCC Rcd at 2226, ¶ 54 (Pet. App. 109a). The Commission explained that its treatment of unlicensed broadcasters reflected a "middle ground" approach between the position of "many commenters * * * that anyone who has operated illegally should not be eligible for a license" and the position of others who "argue[d] for amnesty

for unlicensed broadcasters." *Id.* at 2225-2226, ¶ 52 (Pet. App. 108a).

On reconsideration, the Commission clarified that, "in no event will an unlicensed broadcaster be eligible for an LPFM license if it continued illegally broadcasting after February 26, 1999." Memorandum Opinion and Order on Reconsideration, *Creation of Low Power Radio Service*, 15 FCC Rcd 19208, 19245, ¶ 95 (2000) (Pet. App. 113a-114a). The Commission also explained that its "rule on unlicensed broadcasters was based on our concern that past illegal broadcast operations reflect on the entity's proclivity to deal truthfully with the Commission and to comply with our rules and policies." 15 FCC Rcd at 19245, ¶ 96 (Pet. App. 114a). Any party ignoring a Commission order to cease unlicensed broadcasting, the Commission observed, "has demonstrated an unwillingness to comply with the Commission's rules and thus should not be rewarded with an LPFM license." *Ibid.*

c. The Commission's LPFM rules, including its decision to permit a narrow class of unlicensed broadcasters to remain eligible for LPFM licenses, engendered substantial opposition in Congress. Pet. App. 7a. Soon after the Commission adopted its first Report and Order, Senator Gregg introduced a bill to repeal the LPFM rules. *Ibid.* Among his objections were that the rules would "make[] formerly unlicensed, pirate radio operators eligible for LPFM licenses," which would "reinforce[] their unlawful behavior and encourage[] future illegal activity by opening the door to new unauthorized broadcasters." 146 Cong. Rec. S626 (daily ed. Feb. 10, 2000). In his view, the rules therefore "not only reward[] illegal activity, but * * * undermine the integrity of the radio spectrum." *Ibid.*

A House committee held a hearing on a similar proposal to repeal the LPFM rules. *FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities: Hearing on H.R. 3439 Before the Subcomm. on Telecomm., Trade, and Consumer Protection of House Comm. on Commerce*, 106th Cong., 2d Sess. (2000) (*House Hearing*). At that hearing, Representative Oxley stated that he "most object[ed] to the provisions making former unlicensed, pirate radio operators eligible for low power licenses," because that would "reinforc[e] their unlawful behavior and encourag[e] new unauthorized broadcasts in the future." *Id.* at 4. In reporting the bill, the committee concluded "that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public, and those individuals or groups should not be permitted to receive licenses in the LPFM service." H.R. Rep. No. 597, 106th Cong., 2d Sess. 8 (2000) (*House Report*); see 146 Cong. Rec. H2309 (daily ed. Apr. 13, 2000) (statement of Rep. Dickey) ("These individuals should not be rewarded for previous unlawful acts that interfered with authorized FM broadcasts.").

Congress's concerns with the initial LPFM rules resulted in enactment of the Radio Broadcasting Preservation Act of 2000 (RBPA or Act), Pub. L. No. 106-553, § 632, 114 Stat. 2762A-111, App. B (Pet. App. 76a-82a). Section 632(a)(1)(B) of the RBPA, the Act's character qualification provision, required the FCC to modify its LPFM rules to "prohibit any applicant from obtaining a low power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934." Congress thus barred all

unlicensed broadcasters from obtaining an LPFM license regardless whether they have ceased unlawful operations. Pet. App. 8a.

The Commission modified its LPFM rules in accordance with this statutory directive. Second Report and Order, *Creation of a Low Power Radio Service*, 16 FCC Rcd 8026, 8030 (2001) (Pet. App. 83a). The Commission's rules now provide (47 C.F.R. 73.854) that "[n]o application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner including individually or with persons, groups, organizations, or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, 47 U.S.C. 301."

3. Petitioner Greg Ruggiero admits that he has engaged in unlicensed broadcasting. Pet. App. 8a; see *Free Speech ex rel. Greg Ruggiero* v. *Reno*, 200 F.3d 63 (2d Cir. 1999). He initiated this action by filing in the court of appeals a petition for review of the FCC's initial LPFM rules. After the completion of briefing and argument, Congress enacted the RBPA. The parties then filed supplemental briefs addressing the RBPA and its implementing rules.

a. A divided panel of the court of appeals found that the RBPA's disqualification of unlicensed broadcasters from LPFM service violates the First Amendment. Pet. App. 52a-75a. The panel majority ruled that the character qualification provision is (i) underinclusive in failing to apply to full-power broadcast licenses or to applicants that violated federal laws other than the license requirement and (ii) overinclusive in applying to applicants that have ceased violating the license

requirement and have exhibited an ability to comply with the governing laws. *Id.* at 67a-69a.

b. The en banc court of appeals vacated the panel opinion and upheld the constitutionality of the RBPA's prohibition against awarding LPFM licenses to unlicensed broadcasters. Pet. App. 3a-49a. Applying a standard that "occupies a ground somewhere between" rational basis review and intermediate scrutiny, *id.* at 10a, the court held that the Act's "character qualification provision is reasonably tailored to satisfying a substantial government interest," *id.* at 13a. The court found that there is a substantial government interest "in ensuring compliance with the Communications Act and in particular with its central requirement of a license to broadcast," *id.* at 14a, and that the character qualification provision is a "targeted response" and a "reasonable fit," *id.* at 18a. In the court's view, "that is surely enough to uphold a prohibition upon broadcast speech that * * * is in no respect content-based." *Id.* at 13a.

The court rejected petitioner's argument that the character qualification provision is impermissibly underinclusive in failing to disqualify applicants guilty of crimes more serious than broadcasting without a license. "Not only are murderers, rapists, child molesters, and the like not particularly associated with the harms caused by unlicensed broadcasting," the court observed, but "the harms that these malefactors do cause are not without other and more severe penalties (state or federal) than ineligibility for an LPFM license." Pet. App. 14a. The court explained that "[a]ll broadcast pirates, by definition, have violated already the requirement of obtaining a broadcast license," and that "Congress could reasonably conclude that other violations of law simply do not reflect as directly upon

the offender's qualification to hold an LPFM license." *Id.* at 15a. Because the RPBA's character qualification provision "targets those who have already violated the broadcast license requirement," the court reasoned, the statute is "reasonably tailored to further the Government's substantial interest in minimizing unlicensed LPFM broadcasting." *Id.* at 16a.

Moreover, the court rejected the suggestion that the character qualification provision is constitutionally suspect because it "disqualif[ies] LPFM pirates from holding an LPFM license, as compared with the consequences visited upon other unlicensed broadcasters and other offenders against the broadcast regulatory regime." Pet. App. 16a-17a n.*. The court explained that the "judgment that one offense is more serious than another * * * is not for the judiciary to make," and that the proper inquiry is "limited to whether the Congress has reasonably tailored the character qualification to fit the substantial government interest it is intended to serve," *i.e.*, limiting unlicensed LPFM broadcasting. *Ibid.*

Finally, the court rejected petitioner's contention that the character qualification provision is impermissibly overinclusive in applying to unlicensed broadcasters that have ceased their unlawful operations and become "model citizens." Pet. App. 16a. The court explained that "[a]ny unlicensed broadcasting demonstrates a willful disregard of the most basic rule of federal broadcasting regulation." *Ibid.* As a result, the court concluded, "Congress did not hit wide of the mark * * * when it treated all pirates alike." *Id.* at 17a.[1]

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[1] Judge Randolph issued a concurring opinion. Pet. App. 18a-24a. In his view, petitioner is barred from challenging the character qualification provision on overbreadth grounds because the

Judge Tatel dissented, reiterating the conclusion he had reached in his opinion for the panel majority that the character qualification provision is both underinclusive and overinclusive. Pet. App. 29a-49a.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. The court of appeals correctly upheld the constitutionality of the RBPA's prohibition against awarding LPFM licenses to unlicensed broadcasters. The FCC has long recognized that unlicensed broadcasting constitutes a serious violation of the Communications Act. As the Commission explained, "[u]nlicensed radio operators not only violate the longstanding statutory [and administrative] prohibition against unlicensed broadcasting," but "[i]llegal radio transmissions raise a particular concern because of the potential for harmful interference to authorized radio operations, including public safety communications and aircraft frequencies." 14 FCC Rcd at 2497, ¶ 65 (Pet. App. 96a). Accordingly, the Commission has used the full range of its authority to ensure that unlicensed broadcasters cease their

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provision entails no cognizable chilling effect on free expression. *Id.* at 19a-23a. Judge Randolph also rejected petitioner's underinclusiveness claim, reasoning that a law's alleged underinclusiveness raises no First Amendment issue in the absence of content-based discrimination. *Id.* at 23a-24a.

[2] Judge Tatel's dissenting opinion was not joined by any other member of the court. Judge Rogers, who initially had joined the panel majority opinion, now reached "a different result" and concurred in the en banc court's decision to uphold the constitutionality of the character qualification provision. Pet. App. 25a.

illegal operations. 14 FCC Rcd at 2497-2498, ¶ 66 (Pet. App. 96a-97a).[3]

In promulgating its initial LPFM character qualification rule, the FCC emphasized that it had "a critical need to ascertain whether a licensee will in the future be forthright in its dealings with the Commission and operate its station in a manner consistent with the requirements of the Communications Act and the Commission's rules and policies." 15 FCC Rcd at 2226, ¶ 53 (Pet. App. 109a). The Commission explained that "past illegal broadcast operations reflect on that entity's proclivity 'to deal truthfully with the Commission and to comply with our rules and policies,' and thus on its basic qualifications to hold a license." 15 FCC Rcd at 2226, ¶ 54 (Pet. App. 109a). The Commission had suggested, however, that "[t]he reliability as licensees of parties who may have illegally operated for a time but * * * ceased operation after being advised of an enforcement action" was "not necessarily as suspect." 14 FCC Rcd at 2498, ¶ 67 (Pet. App. 97a). The

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[3] See, *e.g.*, *Grid Radio* v. *FCC*, 278 F.3d 1314 (D.C. Cir.), cert. denied, 123 S. Ct. 82 (2002); *United States* v. *Szoka*, 260 F.3d 516 (6th Cir. 2001); *United States* v. *Neset*, 235 F.3d 415 (8th Cir. 2000), cert. denied, 534 U.S. 824 (2001); *La Voz Radio de la Communidad* v. *FCC*, 223 F.3d 313 (6th Cir. 2000); *United States* v. *Dunifer*, 219 F.3d 1004 (9th Cir. 2000); *United States* v. *Any & All Radio Station Transmission Equip.*, 218 F.3d 543 (6th Cir. 2000); *Prayze FM* v. *FCC*, 214 F.3d 245 (2d Cir. 2000); *United States* v. *Any & All Radio Station Transmission Equip.*, 207 F.3d 458 (8th Cir. 2000), cert. denied, 531 U.S. 1071 (2001); *United States* v. *Any & All Radio Station Transmission Equip.*, 204 F.3d 658 (6th Cir. 2000); *Radio Luz* v. *FCC*, 88 F. Supp. 2d 372 (E.D. Pa. 1999), aff'd, 213 F.3d 629 (3d Cir. 2000) (Table). The Commission shut down 153 unlicensed radio stations in 1998, 154 such stations in 1999, and 25 such stations in the first two months of 2000. *House Hearing* 85.

Commission therefore decided not to disqualify unlicensed broadcasters from obtaining an LPFM license if, prior to February 26, 1999, they had ceased their unlawful operations "voluntarily" or "within 24 hours of being directed by the FCC to terminate unlicensed operation." 15 FCC Rcd at 19,263 (Pet. App. 116a).

Congress concluded that it was necessary to go further, and directed the Commission in the RPBA to prohibit *all* unlicensed broad casters from obtaining an LPFM license. Congress, like the FCC, was concerned "that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public." *House Report* 8. But Congress was also concerned that permitting any category of unlicensed broadcasters to remain eligible for LPFM licenses would undermine the integrity of the federal broadcast licensing system by encouraging unlawful behavior. See pp. 4-5 *supra*.

As the court of appeals correctly found, Congress's conclusion that all unlicensed broadcasters should be disqualified from eligibility for an LPFM license was reasonable and fully constitutional. There is a substantial governmental interest in promoting compliance with the Communications Act's basic licensing requirement, Pet. App. 13a-14a, and the RPBA constitutes a valid and "targeted response to the problem of pirate broadcasting," affecting "only those who violated the license requirement, and [doing] so utterly without regard to the content of, or any view expressed by, their unlicensed broadcasts," *id.* at 18a. The bar against awarding an LPFM license to unlicensed broadcasters encourages compliance with the licensing requirement and prohibits those with a history of disregarding

broadcast laws from obtaining a license to conduct LPFM operations. See *id.* at 15a (What "could be more reasonable or logical than to suspect that those who ignored the Commission's LPFM broadcast regulations in the past are likely to do so in the future and therefore to head them off?") (internal quotation marks omitted).

2. Petitioner renews his contention (Pet. 15-25) that the RPBA's character qualification provision violates the First Amendment. That claim lacks merit.

a. As a threshold matter, petitioner submits (Pet. 16-17) that the court of appeals should have applied "intermediate scrutiny" in evaluating the character qualification provision but that the court instead, "in effect, applied minimal scrutiny." That is incorrect.

The court of appeals specifically declined to apply "minimal scrutiny" and instead applied a form of heightened scrutiny, assessing whether the character qualification provision "is reasonably tailored to satisfying a substantial government interest." Pet. App. 12a-13a. The court characterized that standard as "occup[ying] a ground somewhere between" rational basis review and intermediate scrutiny. *Id.* at 10a. The court's approach was grounded in the recognition that this Court has generally applied "a less rigorous standard of First Amendment scrutiny to broadcast regulation," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994); see *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-399 (1969), and that intermediate scrutiny applies to broadcast regulations only when the restriction on speech is content-based. Pet. App. 10a-11a; see, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984).

Petitioner does not challenge the court of appeals' conclusion that the RBPA's prohibition against awarding an LPFM license to unlicensed broadcasters "is

triggered solely by the applicant's conduct" and "applies without regard to any content the applicant may have broadcast unlawfully or might be expected to broadcast if a license were issued to him." Pet. App. 11a. Accordingly, petitioner errs in relying (Pet. 20) on decisions in which this Court has invalidated content-based broadcast regulations under intermediate scrutiny. See *League of Women Voters*, 468 U.S. at 388-399; see also *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 188 (1999).

In any event, petitioner's abstract disagreement with the court of appeals' characterization of the applicable constitutional standard does not warrant review. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (internal quotation marks omitted). Intermediate scrutiny requires the government to demonstrate a substantial interest in the challenged provision, see, *e.g.*, *Turner Broad.*, 512 U.S. at 662, and petitioner does not dispute the court of appeals' conclusion that the government "no doubt" has a substantial interest in promoting compliance with the Communications Act's licensing requirement, Pet. App. 14a. Moreover, while intermediate scrutiny requires "narrow tailoring," that requirement only calls for a "reasonable" fit and not does not demand "employ[ing] the least restrictive means conceivable." *Greater New Orleans Broad.*, 527 U.S. at 188; see *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 429 (1993); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798-800 (1989). In this case, the court of appeals found that "[t]here is a reasonable fit between the character qualification and the Government's substantial interests." Pet. App. 18a.

b. Petitioner errs in arguing that the RBPA is impermissibly underinclusive and overinclusive. Peti-

tioner contends (Pet. 21) that the failure of Congress to include "civil wrongdoers, felons" and the like within the scope of the RBPA's ban undermines the validity of the government's rationale. As the court of appeals explained (Pet App. 14a), however, there was no evidence of a pressing problem concerning those categories of persons seeking to apply for LPFM licenses. Moreover, persons not covered by the RBPA's bar are subject to the FCC's general character qualification policy, under which they may be disqualified from obtaining a license in any event. *Id.* at 15a; see *Contemporary Media, Inc.* v. *FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (upholding revocation of station license held by company whose president and sole shareholder had been convicted of felony child abuse).

Petitioner argues (Pet. 19) that application of the FCC's "traditional character qualification policies" to the new low power licensing scheme would have been sufficient to achieve "regulatory compliance." In the view of the FCC and Congress, however, a character qualification provision specific to the LPFM regulatory scheme was desirable because of the particular long-standing and persistent problem of unlawful low power broadcasts. As the extensive litigation and administrative history of the issue had shown, the problem of unlicensed broadcasting had been directly associated with the low-power movement. See, *e.g.*, *Grid Radio*, 278 F.3d at 1317; *House Hearing* 28-29 (prepared statement of E.O. Fritts and B.T. Reese) ("[T]he fact is that the LPFM movement does have roots in pirate broadcasting."). Nothing in the Constitution compels a court to impose petitioner's suggested regulatory policy over the judgment of Congress and the expert administrative agency. See *Ward*, 491 U.S. at 800.

Finally, the court of appeals correctly refused to second-guess Congress's judgment concerning the need for a blanket prohibition against awarding LPFM licenses to unlicensed broadcasters. See Pet. App. 15a-16a & n.*. As the court explained, "[a]ny unlicensed broadcasting demonstrates a willful disregard of the most basic rule of federal broadcasting regulation." *Id.* at 16a. In Congress's view, even if a particular unlicensed broadcaster could demonstrate a renewed commitment to adhering to the applicable rules, the possibility that a category of unlicensed broadcasters would remain eligible for LPFM licenses would encourage the belief among others that no lasting consequences would ensue from noncompliance with—indeed, outright defiance of—fundamental regulatory requirements. The RBPA promotes an understanding that failure to abide by the Communications Act's basic licensing requirement carries serious consequences. Because the RBPA's disqualification provision directly advances the government's interest in ensuring the compliance integrity of the federal system of broadcast regulation, its disqualification of unlicensed broadcasters is fully constitutional.[4]

[4] Petitioner also renews his contention (Pet. 26) that the character qualification provision violates the equal protection component of the Fifth Amendment's Due Process Clause. As the court of appeals correctly explained (Pet. App. 17a-18a), that claim is subject to the same analysis as petitioner's First Amendment claim and fails for the same reasons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
MARK S. DAVIES
Attorneys

JOHN A. ROGOVIN
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Counsel
Federal Communications Commission

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IN THE

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GREG RUGGIERO,

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FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

ROBERT T. PERRY
Counsel of Record
BARBARA J. OLSHANSKY
Center for Constitutional Rights
666 Broadway, Seventh Floor
New York, New York 10012
212-614-6480

Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

No. 02-1608

GREG RUGGIERO,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

The Government's brief in opposition to the petition makes three propositions plain.[1] First, Section 632(a)(1)(B)

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[1] Respondents Federal Communications Commission ("FCC"), *et al.*, are collectively referred to as "the Government." The Govern-

of the Radio Broadcasting Act of 2000 ("RBPA"), Pub. L. No. 106-553, 114 Stat. 2762 (2000)—automatically and permanently disqualifying all former unlicensed microbroadcasters from holding low power FM ("LPFM") licenses—imposes an unprecedented draconian sanction. The Government does not dispute—and thus concedes—that no one has ever before been automatically and permanently disqualified from holding a broadcast license because of past misconduct.

Second, Congress enacted Section 632(a)(1)(B) without even considering the adequacy of a readily available, less burdensome alternative—namely, the FCC's traditional character qualification policies for broadcast licensees (Pet. at 5-7)—in ensuring the selection of truthful and reliable LPFM licensees and deterring future unlicensed microbroadcasting. The Government has not cited—and presumably cannot find—any mention, let alone discussion, of the latter policies in the RBPA's sparse legislative history.

Third, given that Congress never addressed the adequacy of the FCC's traditional character qualification policies for broadcast licensees, there is no reason, other than pure speculation (Govt. Br. at 14-15), to believe that these policies would prove any less effective than Section 632(a)(1)(B) in ensuring the selection of truthful and reliable LPFM licensees and deterring future unlicensed microbroadcasting.

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ment's brief in opposition to the petition is denoted "Govt. Br." The Petition for a Writ of Certiorari is denoted "Pet."

I.

SECTION 632(a)(1)(B) WARRANTS INTERMEDIATE SCRUTINY

The Government argues that intermediate scrutiny applies to broadcast regulations only when the restriction on speech is content-based, citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), and *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999). (Govt. Br. at 12-13) The ban on editorializing at issue in *League of Women Voters* was, however, "at some remove from pure content [regulation], as it forbade 'editorializing' of any kind by the covered stations." *News America Publ'g Inc. v. FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988). *See also League of Women Voters*, 468 U.S. at 418 (Stevens, J., dissenting) ("There is simply no sensible basis for considering this regulation . . . as content-based . . . because it applies equally to station owners of all shades of opinion").

More importantly, the ban on broadcast advertising of private casino gambling at issue in *Greater New Orleans Broad. Ass'n* was a mere restriction on commercial speech. Time and again, this Court has made clear that content-neutral regulations of expressive conduct, including conduct expressive of political views, warrant at least as much First Amendment scrutiny as restrictions on commercial speech. *See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989) ("we think it would be incompatible with the asserted subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard" than in assessing the validity of content-neutral time, place, and manner regulations

of expressive conduct, "including conduct expressive of political views"); *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993) (same).

In seeking to distinguish *League of Women Voters* from this case, the Government also overlooks a striking parallel between the two cases. Like the ban on editorializing at issue in *League of Women Voters*, which applied only to certain noncommercial broadcasters, Section 632(a)(1)(B) "singles out" a limited, well-defined class of speakers—former unlicensed microbroadcasters—"den[ying] them the right to address their chosen audience on matters of public importance [through the broadcast medium]." 468 U.S. at 384. Indeed, given that Section 632(a)(1)(B) bars former unlicensed microbroadcasters from *ever* engaging in *any* speech over the broadcast medium, it is far more comprehensive—and, in that respect, far more troubling—than the ban on editorializing at issue in *League of Women Voters*. If intermediate scrutiny was warranted there, such scrutiny surely is warranted here.

Contrary to the Government's assertion, petitioner does not raise merely an "abstract disagreement" with the decision below. (Govt. Br. at 13) As Judge Tatel observed, the court of appeals, in effect, applied a rational basis standard, treating Section 632(a)(1)(B) as presumptively valid and disregarding the many ways in which it is poorly tailored. App. 35a.

True, intermediate scrutiny's "narrow tailoring" requirement demands a "reasonable" fit and not "the least restrictive means conceivable." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188. (Govt. Br. at 13) The ready availability of "obvious less-burdensome alternatives" is, however, "certainly a relevant consideration in determining

whether the 'fit' . . . is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n.13 (1993). Indeed, the availability of such alternatives signals that the fit "may be too imprecise to withstand [intermediate] scrutiny." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring).

II.

SECTION 632(a)(1)(B) FAILS INTERMEDIATE SCRUTINY

The Government asserts that, in the FCC's and Congress's view, an LPFM-specific character qualification provision "was desirable because of the specific and persistent problem of unlawful low power broadcasts." (Govt. Br. at 14) Nothing in the RBPA's sparse legislative history or the LPFM rulemaking record, however, even remotely suggests that the FCC's traditional character qualification policies for broadcast licensees would prove any less effective in addressing that problem.[2]

While unlicensed broadcasting may be associated with the low-power movement (Govt. Br. at 14), such activity is, by no means, exclusive to that movement. *See, e.g., Weiner Broad. Co.*, 7 F.C.C. Rcd. 832 (Rev. Bd. 1992) (broadcast license applicant operated multiple unlicensed full power AM and FM stations during 1980's); *Peninsula Comm., Inc.*, FCC 03D-01 (I.D. June 19, 2003) (full power FM broadcaster continued to operate seven FM translators

[2] Because the FCC barred low power FM broadcasting until very recently, those traditional character qualification policies have never been applied to low power FM broadcasting.

after the FCC rescinded operating authority); *Liberty Cable Co.*, 15 F.C.C. Rcd. 25050 (2000) (wireless cable operator activated 93 operational fixed service microwave paths without prior FCC authorization).

Defending Section 632(a)(1)(B)'s underinclusiveness, the Government suggests that there is no evidence that civil wrongdoers, felons, and the like will apply for LPFM licenses. (Govt. Br. at 14) But there is also no evidence to suggest that civil wrongdoers, felons, and the like will refrain from applying for LPFM licenses. More importantly all applicants who have engaged in prior misconduct pose a risk of unreliable broadcast behavior, regardless of the nature of the misconduct. *Cf. Policy Regarding Character Qualifications in Broad. Licensing*, 5 F.C.C. Rcd. 3252, 3252 (1990) ("an applicant's willingness to violate other laws, and in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies"). That civil wrongdoers, felons, and the like may face other penalties (Govt. Br. at 14) does not diminish that risk.

Defending Section 632(a)(1)(B)'s overinclusiveness, the Government asserts that in Congress's view, even if former unlicensed microbroadcasters could demonstrate rehabilitation, the possibility that they would remain eligible for LPFM licenses would encourage others to believe that no lasting consequences would flow from unlicensed microbroadcasting. (Govt. Br. at 15) It is far from clear, however, that Congress, as a whole, held such a view. The only relevant legislative finding focuses, *not* on any need for general deterrence, *but rather* on the need to ensure selection of truthful and reliable LPFM licensees. *See* H. Rep. No. 106-567, 106th Cong. 2d Sess. 8 (2000) ("The Com-

mittee concludes that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public, and those individuals or groups should not be permitted to receive licenses in the LPFM service").[3]

In any event, it is wholly speculative to believe that the FCC's traditional character qualification policies for broadcast licensees would prove any less effective than Section 632(a)(1)(B) in deterring future unlicensed microbroadcasting, especially given the lack of any debate in Congress or before the FCC on the issue. "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must . . . demonstrate . . . that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

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[3] "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. We have eschewed reliance on the passing comments of one Member, and casual statements from the Floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal citations and quotations omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT T. PERRY
Counsel of Record
BARBARA J. OLSHANSKY
Center for Constitutional Rights
666 Broadway, Seventh Floor
New York, New York 10012
(212) 614-6480

Counsel for Petitioner

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